CAUSE NO. 18-08-0777-CVA

SAN MIGUEL ELECTRIC COOPERATIVE, INC.	§	**IN THE DISTRICT COURT OF**
Plaintiff,	§	
	§	**218th JUDICIAL DISTRICT**
vs.	§	
	§	
A.M. PEELER RANCH, LLC, et al.,	§	
Defendants.	§	**ATASCOSA COUNTY, TEXAS**
	§	
	§	
A.M. PEELER RANCH LLC, et al.	§	
Counter-Plaintiffs,	§	
	§	
vs.	§	
	§	
AECOM, et al.,	§	
Counter-Defendants.	§	
	§	
	§	
JASON PEELER,	§	
Intervenor,	§	
	§	
vs.	§	
	§	
AECOM, et al.,	§	
Counter-Defendants.	§	

THE PEELER PARTIES' FIRST AMENDED ANSWER, FIRST AMENDED COUNTERCLAIM PETITION, REQUEST FOR DISCLOSURES & APPLICATIONS FOR DECLARATORY RELIEF AND MANDATORY INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Defendants/Counter-Plaintiffs AM Peeler Ranch, LLC, Alonzo M. Peeler, Jr., and Barbara Gene Peeler, and Intervenor Jason Peeler (hereinafter collectively referred to as the "Peelers"), in the above-entitled and numbered cause and file this First Amended Answer, Counterclaim Petition, Request for Disclosure & Applications for Declaratory Relief and Mandatory Injunctive Relief against the following **cooperative/corporate counter-defendants**:

1) Plaintiff/Counter-Defendant San Miguel Electric Cooperative, Inc. ("SMECI"), the owner of the San Miguel Lignite Plant and associated mining facilities and successor-in-interest to certain lease contracts;
2) Counter-Defendant Kiewit Mining Group Inc. ("Kiewit"), the current operator of the San Miguel Lignite Mine; and
3) Counter-Defendant South Texas Electric Cooperative, Inc. ("STEC"), who purchases the power generated by SMECI, provides management services to SMECI, remains a party to disputed lease contracts, and is vicariously liable for SMECI's breaches of contract, torts, and statutory violations;

as well as the following **individual counter-defendants**:

A. Individuals who have served as directors on the board of SMECI (several of whom also concurrently have served on the board of STEC) since January 2015, and who are being sued in their individual capacities:
    1) Rolando Alaniz;
    2) Brad Bierstedt;
    3) James Coleman;
    4) John Herrera (current SMECI Board Assistant Secretary/Treasurer);
    5) Ron Hughes;
    6) Michael Jacobs (current SMECI Board Vice President);
    7) Leroy Kaspar;
    8) Mike Kezar;
    9) Dick Koop;
    10) Reynaldo Lopez (former SMECI Board President);

11) Trace McCuan;

12) Gary Rayborn;[1]

13) Mark Rollans (current SMECI Board Secretary/Treasurer);

14) David Rosse;

15) Larry Schendel;

16) Leroy Skloss (former SMECI Board President);

17) Marshall Shirley (former SMECI Board President);

18) Clyde Stewart;

19) Blaine Warzecha;

20) Don Wehmeyer (current SMECI Board President);

21) Kenneth White (current SMECI Board Vice President); and

B. Individuals who served in senior-staff positions for SMECI and STEC, and who also are being sued in their individual capacities:

1) Derrick Brummett (SMECI's current Administrative Services Manager and former Interim General Manager);

2) Dave Burris (SMECI's current Fuels Manager);

3) Dan Cates (SMECI's current Plant Manager);

4) Nellie Frisbee (SMECI's former Fuels Manager); and

5) Mike Kezar (current General Manager of both STEC and SMECI).[2]

In support thereof, Defendants/Counter-Plaintiffs and Intervenor respectfully would show the Court as follows:

[1] Rayborn served as president of STEC's board of directors in 2017-18.

[2] Kezar also served as a SMECI board member in 2015 and, according to SMECI's amended articles of incorporation, serves a member of the SMECI board based on his role as STEC's general manager.

I. GENERAL DENIAL

1. Pursuant to TEX. R. CIV. P. 92, Defendants/Counter-Plaintiffs generally deny each and every, all and singular, assertions alleged in Plaintiff/Counter-Defendant SMECI's Third Amended Petition. Plaintiff/Counter-Defendant SMECI must prove the charges and allegations against Defendants/Counter-Plaintiffs by the greater weight of the believable evidence, as required by the Constitution and Texas law.

2. Pursuant to TEX. R. CIV. P. 788, Defendants/Counter-Plaintiffs plead not guilty to the injury complained of in the Third Amended Petition filed by Plaintiff/Counter-Defendant SMECI. Plaintiff/Counter-Defendant SMECI's Third Amended Petition is couched as a claim for a Declaratory Judgment but is actually a Trespass to Try Title Claim since Plaintiff/Counter-Defendant SMECI claims interest in a leasehold estate.

II. AFFIRMATIVE DEFENSES

3. Plaintiff/Counter-Defendant SMECI's Third Amended Petition, and each and every claim alleged therein, fails to state a claim upon which relief may be granted.

4. Plaintiff/Counter-Defendant SMECI is not entitled to relief to the extent that it has unclean hands.

5. Plaintiff/Counter-Defendant SMECI's Third Amended Petition is barred in whole or in part by virtue of Plaintiff/Counter-Defendants' own breach of the contracts.

6. Plaintiff/Counter-Defendant's Third Amended Petition and each cause of action alleged therein is barred on the grounds that Plaintiff/Counter-Defendant failed to fulfill its obligations under the contracts.

7. Plaintiff/Counter-Defendant's damages are barred in whole or in part by Plaintiff/Counter-Defendant's comparative fault and contributory negligence.

8. Plaintiff/Counter-Defendant fails to state a claim for Declaratory Judgment and has not met the more stringent pleading standard for a Trespass to Try Title Claim, which is required under Texas law when challenging a leasehold interest.

III. FIRST AMENDED COUNTERCLAIM PETITION

A. Nature of Claims

9. The Peelers brings their counterclaims against Counter-Defendants for the widespread contamination of significant portions of the Peeler Ranch. The Peelers seek a declaratory judgment regarding liability for the contamination, monetary damages, and all other relief to they are entitled under the law, including site investigation costs and attorneys' fees.

10. The Peelers also seek a mandatory injunction requiring cleanup of the contamination and restoration of the property that results, at a minimum, in: (1) full site characterization including vertical and horizontal delineation of the pollution; (2) the complete removal of coal ash and other solid or hazardous waste disposed in and on the Peeler Ranch; (3) closure or retrofit of the surface impoundments and Ash Landfill at the Plant with composite liners with a synthetic liner; (4) no impact to surface or groundwater with contaminants above natural background levels, and (5) the land returned to conditions before installation of the Plant and Mine operation, including comparable trees and vegetation.

Nature of Liability of Three Corporate/Cooperative Counter-Defendants for Counts 1-5

11. The Peeler Ranch is located between Jourdanton and Tilden near the community of Christine in southern Atascosa County, Texas, and consists of ten-acre tracts and certain other larger tracts out of the Charles F. Simmons Subdivision, also known as the S. S. Farms. It is currently about 25,000 acres in size. The property at issue in this lawsuit is currently owned in undivided fractional shares by A.M. Peeler Ranch, LLC, Alonzo M. Peeler, Jr., Barbara Gene

Peeler, and Jason Peeler and was previously owned by Alonzo M. Peeler, Jr. and Barbara Gene Peeler; the specific ownership depends on the tract in question.

12. The Peeler Ranch has been burdened by a lignite coal mining lease since 1953. Coal was mined out completely as of February 2004. Instead of restoring the ranch and returning the property to the landowners as required under the lease, SMECI and the other Counter-Defendants continue to use the Peeler Ranch as a dump site for toxic coal combustion residuals (commonly known as "coal ash") and have caused the widespread and significant contamination of groundwater, surface water, and soil, in part by negligent wastewater management practices and failure to suppress fugitive dust.

13. SMECI claims a right to hold the mineral lease acreage for as long as the company wants through the payment of annual rentals, even though the Peelers will never see any additional benefit from coal production. For the price of $2.00 an acre per year, and without an express easement, SMECI purports to hold over 6300 acres of the Peeler Ranch to use as a permanent waste disposal site. SMECI claims the Peelers have no power to stop the company from destroying the Peelers' land and water because the 1953 mineral lease term is "perpetual," even though all the lignite has been exhausted.

14. The Peelers agreed to allow mining on their property in exchange for certain payments and the promise to return the ranch to its previous condition when mining concluded. Their trust and patience have been abused, and SMECI and the other Counter-Defendants have turned significant portions of the Peeler Ranch into a toxic dump, knowingly and intentionally exposing the Peelers to long-term, if not perpetual, environmental liability.

15. The Peeler Ranch is also burdened by the San Miguel Power Plant, a 440-megawatt lignite-fired electric power plant, located within the perimeter boundaries of the ranch, essentially in the central quadrant of the Peeler Ranch.

16. The Plant generates millions of tons of coal ash every year and generates three primary coal ash waste streams: fly ash, bottom ash, and flue gas desulfurization ("FGD" or "scrubber") wastes. These coal ash wastes are first sent to two Ash Ponds and an Equalization Pond on-site. The Ash Ponds and Equalization Pond are roughly forty years old and are little more than giant holes in the ground. The only thing standing between the toxic coal ash in these ponds and the groundwater beneath the ponds is the soil and clay at the bottom of the ponds, which is routinely disturbed using a digger to dredge the coal ash out of the ponds for disposal in the Mine. After the coal ash is sent to the ponds for settling, it is dredged from the ponds, dried, and placed in an uncovered ash pile (*i.e.*, a landfill) at the Plant (the "Ash Pile").

17. SMECI's own testing reveals the Ash Ponds, Equalization Pond, and Ash Pile have released contaminants associated with coal ash into the groundwater, which flows through the Peeler Ranch toward the Atascosa River. The leaks, overflows, illegal discharges, and seepage of wastewater contained in the surface impoundments and leachate that flows out of the ash pile has polluted the groundwater, surface water, and soils on the ranch, killing vegetation and potentially harming fish and other wildlife.

18. On a routine (daily) basis, trucks haul the coal ash from the Ash Pile to the Mine, where the coal ash is dumped into fractured mine pits, with piles extending hundreds of feet into the air from ground elevation. The pits are open to the elements, so that wind can blow coal ash onto adjacent land and rain can infiltrate the coal ash. Like the impoundments at the Plant, the mine pits do not have a double liner containing a synthetic liner. The fractures from the mine

process along with precipitation have resulted in infiltration of groundwater and surface water with the ash (and other solid or hazardous waste) disposed in the pits. Kiewit, the current operator of the Mine, stated on its website that it hauls nearly two (2) million tons of coal ash from the Plant for disposal in the Mine every year.[3]

19. Additionally, Counter-Defendant SMECI handled, stored, treated, transported, and disposed other solid or hazardous wastes generated at the Plant and from mining activities—such as trichloroethane and other spent solvents—on the Peeler Ranch in landfills, as evidenced by publicly recorded deed records listing the waste disposed, despite the absence of any lease provision allowing such misuse of the property.

STEC's Liability for Counts 1-5

20. "San Miguel [Electric Cooperative, Inc.] was created on February 17, 1977, under the Rural Electric Cooperative Act of the State of Texas, for the purpose of owning and operating the generating plant and associated mining facilities that furnish power and energy to Brazos Electric Power Cooperative, Inc. . . . and South Texas Electric Cooperative, Inc. . . ."[4]

21. In a pleading filed in an earlier civil case in 2009, STEC admitted that SMECI "exist[ed] solely" for the benefit of STEC and Brazos Electric Power Cooperative, Inc ("Brazos").[5]

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[3] *See* Kiewit Corp. website, *San Miguel Lignite Mine*, https://www.kiewit.com/projects/mining/contract-mining/san-miguel-lignite-mine/ (last visited Sept. 21, 2019). On its website, Kiewit previously referred to the Peeler Ranch and the former Abercrombie Ranch where the ash has been disposed in the previously mined pits as "dump" sites. Since the filing of this lawsuit, Kiewit has removed this statement from its website.

[4] Consolidated Brief of Intervenor for Petitioners San Miguel Electric Cooperative, Inc. and Amici Industrial Energy Consumers of America, Southeastern Legal Foundation, Inc., and Putnam County, Georgia, in *EME Homer City Generation, L.P. v. E.P.A.*, 2012 WL 894497, at *IX (D.C. Cir. Mar. 16, 2012).

[5] *See* Plaintiffs' Response to Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint in *South Texas Electric Cooperative v. Southeastern Mechanical Services, Inc.*, 2009 WL 2411073, at *1 (W.D. Tex. May 11, 2009) ("If there ever was a case that demonstrates a party's intent to benefit a third party, this is it. Defendant contracted with San Miguel Electric Cooperative . . . for boiler maintenance work at its power plant facility. The SMEC facility exists solely to provide power to its only two customers – Plaintiffs STEC and Brazos. And SMEC contracted for maintenance work solely to continue to serve the needs of STEC and Brazos."); *see also Brazos Electric Power Cooperative, Inc., v. San Miguel Electric Cooperative, Inc*., 2015 WL 1651456, at *1 (W.D. Tex. Apr. 14. 2015)

As discussed below, at the end of 2015, Brazos ceased being a customer of STEC. Since that date, SMECI has "existed solely" to benefit of its only customer, STEC.

22. "Effective December 31, 2015, Brazos Electric Cooperative, SMEC, and STEC completed the settlement of their lawsuit . . . over the interpretation of the wholesale power contracts and the coordination contract that was pending in the 126th Texas District Court of Travis County, Texas. In connection with the Settlement: (i) Brazos assigned all of its rights and obligations under its wholesale power contract with SMEC and the coordination contract to STEC and STEC accepted such assignment; (ii) Brazos assigned to SMEC all of Brazos' right, title, and interest in SMEC patronage capital and SMEC accepted such assignment; (iii) Brazos made a $127,500,000 cash payment to SMEC; (iv) SMEC granted a deed to all of its mineral interests (other than its interest in coal and lignite) in equal portions to Brazos and STEC; (v) Brazos and each of the Brazos-system member cooperatives withdrew from their membership in SMEC; (vi) each director and alternate director nominated by Brazos and each of the Brazos-system member cooperatives to serve on the SMEC board of directors resigned from the SMEC board of directors; (vii) the parties to the lawsuit released one another from certain claims and liabilities; and (viii) the parties to the lawsuit filed an agreed motion to dismiss the lawsuit with the 126th District Court of Travis County, Texas. The Court entered an order dismissing the lawsuit on January 22, 2016. Following the Settlement, only STEC and the STEC-system member cooperatives remained as members of SMEC. Following the Settlement, the remaining members of SMEC met on January 5, 2016, to (a) approve the SMEC Articles of Incorporation and Bylaws to restructure the SMEC board of directors and (b) elect new directors. For the years ended December 31, 2017 and 2016,

("[SMECI's] fundamental purpose is to furnish electric capacity and energy solely to Brazos and Brazos's fellow patron of San Miguel, STEC.").

respectively, the General Manager for STEC also serve[d] as the General Manager for SMEC pursuant to a Board approved Management Services Agreement."[6]

23. On January 6, 2016, SMECI filed its "first amended and restated" Articles of Incorporation with the Texas Secretary of State. Those articles reduced the number of its directors from 28 to 17 and provided a formula for appointing the board of directors. Each "member" electric cooperative of STEC has two SMECI board members, and STEC's general manager also serves as a SMECI board member. That formula effectively allows members of the STEC's board to represent a majority of SMECI's board. Currently, ten[7] of the SMECI's 17 board members – including Mike Kezar, STEC's general manager[8] – are also members of STEC's board.[9] The president of SMECI's board, Don Wehmeyer, is a member of STEC's board.

24. "San Miguel's total cost of owning and operating the plant, including debt service[,] is the responsibility of STEC." [Admission in power point presentation made during SMECI's Operating Committee Meeting in November 2016. SMEC00062414]. That is, STEC completely controls the SMECI's property and finances.

25. Shortly after STEC and Brazos split, in the spring of 2016, the boards of directors of SMECI and STEC entered into a written agreement whereby STEC and SMECI would share the services of Mike Kezar as general manager of both cooperatives. Kezar assumed that role in

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[6] STEC, *2017 Annual Report (Strength Through the Storm)*, at page 38, *available at* https://www.stec.org/sites/stec/files/PDF/Annual%20Report/STECannual17.pdf (last visited Sept. 21, 2019).

[7] Brad Bierstedt, James Coleman, John Herrera, Ron Hughes, Leroy Kaspar, Mike Kezar, Gary Rayborn, Mark Rollans, Blaine Warzecha, and Don Wehmeyer.

[8] The current members of SMECI's board are listed here: http://www.smeci.net/about-us/our-leadership (last visited Sept. 21, 2019). Kezar is not listed as a board member on the website, but the 2016 "amended and restated" articles of incorporation provide that STEC's general manager is automatically a member of SMECI's board of directors. Kezar is STEC's general manager. Even without Kezar, the majority of SMECI's remaining board members (9/16) are also members of STEC's board.

[9] The current members of STEC's board are listed here: https://www.stec.org/content/board-directors (last visited Sept. 21, 2019).

January 2016. Notably, in 2017 and 2018, STEC paid Kezar over $2.5 million and over $1.5 million in annual salaries those years. *See* STEC's IRS Forms 990 (2017 & 2018). In 2017, SMECI paid Kezar no annual salary even though, according to SMECI's official filing with the IRS, he worked on average 35 hours per week for SMECI. *See* SMECI's IRS Form 990 (2017) (filed October 26, 2018). SMECI has not yet filed an IRS Form 990 for 2018, so Kezar's annual salary paid by SMECI in 2018 and the average weekly hours that he worked for SMECI is not yet known.[10]

26. The SMECI board of directors sets the rate it charges STEC. In other words, STEC, in view of its control of the board, sets the rate that STEC pays for the energy produced by the Plant. The Electric Cooperative Corporation Act ("ECCA") requires an electric cooperative to charge rates that are sufficient to pay its operating expenses, pay off its loans and "create reserves." TEX. UTIL. CODE 161.059(b). The cooperative is supposed to apply its revenue to the payment of operating expenses and loans and then to "the reserves prescribed by the board for improvement, new construction, depreciation, and ***contingencies.***" *Id.* at § 161.059(c) (emphasis added). Further, the cooperative is to "periodically return revenues not required for the purposes prescribed by Subsection (c)." *Id.* at § 161.059(d). The rate set for the power that STEC purchases from SMECI is and has been too low to cover SMECI's debt and long-term obligations, including reclamation costs. Prior to the Brazos settlement, SMECI had ***no reserves***. It costs more money for SMECI to produce one kilowatt hour of energy than it charges STEC to purchase that energy. Given SMECI's current debt load and the overcapitalization of the SMECI facilities, SMECI has been effectively insolvent for years.

[10] SMECI's Form 990's are available at: https://projects.propublica.org/nonprofits/organizations/741937134. STEC's Form 990's are available at: https://projects.propublica.org/nonprofits/organizations/741393760.

27. Because STEC has controlled SMECI's property, finances, and operations during all relevant time periods – particularly after STEC's board members became a majority of SMECI's board in January 2016 and STEC's general manager became the general manager of SMECI in July 2016 – STEC is vicariously liable for the intentional trespass and statutory violations committed by SMECI.[11] This vicarious liability is based on theories of civil conspiracy and complicity. *See Ernst & Young, L.L.P. v. Pacific Mut. Life Ins. Co*., 151 S.W.3d 573, 583 (Tex. 2001) ("A civil conspiracy involves a combination of two or more persons with an unlawful purpose or a lawful purpose to be accomplished by unlawful means."); RESTATEMENT (SECOND) OF TORTS § 876 (1979).

28. Alternatively, STEC is vicariously liable – not just for the trespass and statutory violations but also for the breach of contract and negligence torts – under Texas's "alter ego" doctrine. In *Castleberry v. Branscum*, 721 S.W.2d 270 (Tex. 1986), the Texas Supreme Court recognized that Texas law allows one business entity to be vicariously liable for another entity's acts and omissions if the two entities were "alter egos" of one another and, furthermore, if not holding both entities legally accountable would "achieve an inequitable result." *Id.* at 271. The Court specifically stated: "We disregard the corporate fiction, even though corporate formalities have been observed and corporate and individual property have been kept separately, when the corporate form has been used as part of a basically unfair device to achieve an inequitable result. . . . Specifically, we disregard the corporate fiction:

> (1) when the fiction is used as a means of perpetrating fraud;
> (2) where a corporation is organized and operated as a mere tool or business conduit of another corporation;
> (3) where the corporate fiction is resorted to as a means of evading an existing legal obligation;
> (4) where the corporate fiction is employed to achieve or perpetrate monopoly;

[11] Vicarious liability under theories of complicity and conspiracy are limited to intentional torts. *See Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996).

(5) where the corporate fiction is used to circumvent a statute; and
(6) where the corporate fiction is relied upon as a protection of crime or to justify wrong."

Id. at 272. In a footnote, the court added a seventh basis: "Inadequate capitalization is another basis for disregarding the corporate fiction." *Id.* at 272 n.3.

29. These seven "bases" were described as separate "categories" by the court. *Id.* at 272 n.3. They were not meant to be multiple "factors" that all had to be satisfied. Stated differently, the corporate form should be disregarded so long as *any* one of the seven exist and refusing to disregard the corporate form would achieve an inequitable result. The Court in *Castleberry* also held that: "Except in very special circumstances, fact questions [about the alter-ego doctrine's application] should be determined by the jury." *Id.* at 277.[12] The Texas Supreme Court reaffirmed *Castleberry*'s recognition of the alter ego doctrine in *SSP Partners v. Gladstrong Investments (USA) Corp*., 275 S.W.3d 444, 454 (Tex. 2008).[13]

30. Particularly since Brazos split from STEC in January 2016, but even beforehand, SMECI has been the alter ego of STEC. In particular, (1) STEC was one of the two entities that

[12] *See also Gardemal v. Westin Hotel Co*., 186 F.3d 588, 593 (5th Cir. 1999) ("Under Texas law the alter ego doctrine allows the imposition of liability on a corporation for the acts of another corporation when the subject corporation is organized or operated as a mere tool or business conduit. . . . It applies when there is such unity between the parent corporation and its subsidiary that the separateness of the two corporations has ceased and holding only the subsidiary corporation liable would result in injustice. . . . Alter ego is demonstrated by evidence showing a blending of identities, or a blurring of lines of distinction, both formal and substantive, between two corporations. . . . An important consideration is whether a corporation is underfunded or undercapitalized, which is an indication that the company is a mere conduit or business tool.") (citations and internal quotation marks omitted).

[13] The court in *SSP Partners* noted that the Texas Legislature had supplanted a portion of *Castleberry*'s analysis related to "constructive fraud" in enacting Article 2.21 of the Texas Business Corporation Act (later re-codified as Business Organizations Code § 21.223). *See id*. at 455-56; *see also Janvey v. Libyan Inv. Authority*, 2012 WL 1059028, at *4 & n.9 (N.D. Tex. Feb. 9, 2012). That portion of the opinion in *Castleberry* does not relate to the "alter ego" doctrine as applied to STEC and SMECI. In any event, even if it did, any statutory limitation of the "alter ego" doctrine in the context of regular business corporations does not apply to the alter ego doctrine in the context of electrical cooperatives. The latter are not governed by the Texas Business Corporation Act. *See Hilco Elec. Co-op., Inc. v. Midlothian Butane Gas Co., Inc*.,111 S.W.3d 75, 78-79 (Tex. 2003). Furthermore, because it is common practice for one or more electric cooperatives to create a new electric cooperative to serve some purpose for the preexisting cooperatives – such as how STEC and Brazos created SMECI – the alter ego doctrine applies with special force in the context of electric cooperatives.

originally created SMECI; (2) a majority of SMECI's board members – including its president – are also STEC's board members; (3) STEC's general manager also serves as SMECI's general manager (and his generous salary, over $1.5 million annually during the past two years, has been paid by STEC); (4) by design, SMECI "exists solely" to provide electricity to STEC *and for no other purpose*; (5) STEC completely controls SMECI's property, finances, and operations; (6) SMECI has set the price of its electricity artificially low solely for the benefit of STEC; and (7) the artificially low rate has led to SMECI's being substantially undercapitalized.

31. In other words, SMECI "is organized and operated as a mere tool" of STEC. *Castleberry*, 721 S.W.2d at 272. STEC has created and used SMECI "as a means of evading an existing legal obligation" to the Peelers. *Id.* STEC also has used SMECI to set artificially low electricity rates, resulting in SMECI's significant undercapitalization. *Id.* at 272 n.3. STEC has created and operated SMECI in the attempt to shield itself from the breach of contract, torts, and statutory violations set forth in the Peelers' petition. It would be inequitable to allow STEC to avoid its legal obligations to the Peelers by asserting the "cooperative shield" in this case.

32. For all these reasons, the Peelers should be permitted to pierce the "cooperative veil" and hold STEC legally accountable along with SMECI, its alter ego. The jury should be instructed to consider this issue at trial, in accordance with the Supreme Court's direction in *Castleberry* (721 S.W.2d at 277).

Nature of Liability of 25 Individual Counter-Defendants for Counts 2-5.

33. In addition to the liability of SMECI and STEC *as entities* for the torts and statutory violation set forth below in Counts 2 through 5, the members of SMECI's board of directors and certain of its senior staff members named as the 25 individual defendants are *personally* liable for the same torts and statutory violations.

34. The 25 individual counter-defendants are not being sued in their official capacities as employees or directors, nor does their personal liability require "piercing the corporate [or cooperative] veil."[14] Rather, they are being sued in their *individual* capacities based on their own acts and omissions related to the torts and statutory violation set forth in Counts 2 through 5.[15]

35. In this regard, directors and senior staff members of a Texas electric cooperative are, at the very least, legally equivalent to directors and senior management of a for-profit corporation, who may be sued in their individual capacities for such acts and omissions.[16]

36. Moreover, an electric cooperative's directors have a heightened legal duty to third parties adversely affected by illegal acts committed by the cooperative's employees or agents compared to a for-profit corporation's directors' duty. That heightened duty is based on the plain

[14] *See Barclay v. Johnson*, 686 S.W.2d 334, 336-37 (Tex. App. – Houston [1st Dist.] 1985, no writ) ("It is not necessary that the 'corporate veil' be pierced in order to impose personal liability, as long as it is shown that the corporate officer knowingly participated in the wrongdoing."); *see also In re Dixon*, 525 B.R. 827, 841 (Bankr. N.D. Ga. 2015) ("While ordinarily being an officer or agent or manager of a corporation does not render one personally liable for a tort committed by the corporation, directors, officers and managers can be individually liable to third parties for participating in or assenting to torts committed by them or their corporation. This liability arises from the tortious conduct of the individual and does not rely on piercing the corporate veil.").

[15] *See Miller v. Keyser*, 90 S.W.3d 712, 717 (Tex. 2002) (noting "Texas' longstanding rule that a corporate agent is personally liable for his own . . . tortious acts" committed during the course of his employment); *State v. Morello*, 547 S.W.3d 881, 885-88 (Tex. 2018) (holding that a corporate officer was personally liable for violating provisions of the Texas Water Code); *see also* William E. Knepper & Dan A. Bailey, 1 LIABILITY OF CORPORATE OFFICERS AND DIRECTORS § 6.07 (2018); Barbara J. Van Arsdale *et al.*, 18B AM. JUR.2D, *Corporations* § 1609.

[16] *See* William E. Knepper & Dan A. Bailey, 1 LIABILITY OF CORPORATE OFFICERS AND DIRECTORS § 12.04 (2018) ("In many respects directors and officers of cooperatives will be subjected to the same liabilities as their counterparts in business corporations. . . . Directors of cooperatives, elected by the members, customarily constitute the governing body of the organization. They function as do directors of business corporations and have comparable responsibilities.").

language of the ECCA.[17] The Act provides that "[t]he business and affairs of an electric cooperative *shall be managed* by a board of directors."[18]

37. An electric cooperative's directors' duty to ***actively*** manage the cooperative's business and affairs thus differs from regular for-profit corporate directors, who may broadly delegate to corporate officers and senior management "the performance of the act[s] [that] involve the exercise of the highest judgment and discretion."[19] In other provisions, the ECCA clearly requires active management by directors and does not permit the type of sweeping delegation to non-board member officers and senior management permitted in the case of a regular corporation.[20]

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[17] *See Hilco Elec. Co-op., Inc. v. Midlothian Butane Gas Co., Inc.,*111 S.W.3d 75, 78-79 (Tex. 2003) (noting that electric cooperatives in Texas are solely the creature of the Electric Cooperative Corporation Act, which "is complete in itself and is controlling"). Unlike the statutes "governing other cooperatives in Texas, the ECCA does not contain supplemental provisions integrating sections of the Non–Profit Corporation Act or general corporation law to fill any gaps in the statute." *Denton County Elec. Co-op., Inc. v. Hackett*, 368 S.W.3d 765, 775 (Tex. App.-Fort Worth 2012) (citing Mariko Kikawa, *Hilco Electric Cooperative v. Midlothian Butane Gas Co.: A Look at Electric Cooperatives in Texas*, 57 BAYLOR L. REV. 461, 465 & n. 14 (2005)).

[18] TEX. UTIL. CODE, § 161.071 (emphasis added). Contrast TEX. BUS. ORG. CODE § 21.401(a) ("[T]he board of directors of a corporation shall: (1) exercise *or authorize the exercise* of the powers of the corporation; and (2) *direct the management* of the business and affairs of the corporation.") (emphasis added). The latter statute clearly allows for more delegation of the board's managerial responsibilities then section 161.071 does (*i.e.*, "authorize the exercise of power" and "direct the management of the business and affairs").

[19] *San Antonio, Joint Stock Land Bank v. Taylor*, 105 S.W.2d 650, 654 (Tex. 1937) (quoting THOMPSON ON CORPORATIONS 758 (3d Ed.)); *see also id.* ("The rule is generally accepted that the president of a corporation may be intrusted by the board of directors with the management of the business of such corporation, and he may perform for the corporation the business it is authorized to transact."); *Helms v. Home Owners' Loan Corp.*, 103 S.W.2d 128, 134 (Tex. 1937) ("Th[e] appointment [of the general manager of the corporation by the board of directors] clothed him with authority to represent said corporation in the management of its affairs, and necessarily carried with it the authority to exercise certain powers in conducting the business which he was employed to manage. The rule generally accepted is that the general manager of a business corporation has the general control and supervision of its affairs for the carrying on of the purposes for which the corporation was incorporated.").

[20] In particular, the ECCA *requires* the board of directors to elect the primary "officers" – president, vice-president, secretary, and treasurer – *from the directors* and does not permit these officers to be chosen from non-board members (which differs from for-profit corporations, which generally have officers who are not active board members). *See* TEX. UTIL. CODE § 161.076(a). In addition, the ECCA also specifically authorizes the full board to "delegate to [an] executive committee [of the board] the management of the current and ordinary business of the cooperative . . . ." *Id.* § 161.077(b). Therefore, the legislature, in enacting the ECCA, clearly intended the board to be an active manager of an electric cooperative.

38. In fact, the Management Services Agreement between STEC and SMECI explicitly states that: "The Board of Directors of SMEC shall at all times exercise overall supervision and control over the business, property and operations of SMEC in accordance with its articles of incorporation and bylaws and shall have all authority and responsibility which must be retained by a board under federal and state laws and regulations." SMEC00271477 at ¶1.

39. Electric cooperative directors are thus not merely liable for their own involvement in the commission of a tort or statutory violation – through participation in, acquiescence in, or post-hoc ratification of employees or agents' acts or omissions.[21] They also are personally liable for their ***negligent supervision*** of the cooperative's employees and agents who commit a tort or statutory violation.[22] As noted, this is liability in the directors' individual capacities. It does not require piercing the corporate veil.

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[21] *See Holberg v. Teal Const. Co*., 879 S.W.2d 358, 360 (Tex. App.-Hou. [14th Dist.] 1994) ("It has long been the rule in Texas that corporate agents are individually liable for fraudulent or tortious acts committed while in the service of their corporation."); *N.S. Sportswear, Inc. v. State*, 819 S.W.2d 230, 232 (Tex. App.-Austin 1991) ("At common law, a corporate officer may be held individually liable for torts of the corporation if he participated in, or had knowledge of and assented to, the wrongful conduct.") (citing *Leyendecker & Assoc., Inc. v. Wechter*, 683 S.W.2d 369 (Tex. 1984)); *see also* Gary Lockwood, LAW OF CORP. OFFICERS & DIR.: INDEMN. & INS. § 1:47 (2013 & 2018 update) ("A corporate director or officer may also be personally liable for the tortious acts of the corporation if the officer sanctioned or ratified such acts. . . . In order for an officer to sanction an act, the officer does not have to have actual knowledge of the fraudulent act. Constructive knowledge will suffice. Circumstantial evidence, including evidence of the way a corporation usually transacts business, can be used to prove constructive knowledge. Direct evidence is not necessary to prove such knowledge. It has been held that an officer or director is not liable unless "with knowledge or recklessly without it, (the officer or director) participates or assists in the fraud.'") (footnotes and citations omitted).

[22] *See* William E. Knepper & Dan A. Bailey, 1 LIABILITY OF CORPORATE OFFICERS AND DIRECTORS § 6.07 (2018) ("As in other areas of tort law, this tort liability can arise based upon the directors' or officers' omissions as well as commissions. . . . While directors and officers of a corporation do not incur personal liability for torts of the corporation merely by reason of their official position, directors or officers may be liable for failing to stop misconduct they ought to know about, particularly when they stand to benefit from the misconduct."); 3A FLETCHER CYC. CORP. § 1137 ("Negligence in not obtaining knowledge of the acts of executive officers or agents may render directors liable, although, in general, directors have no duty to ferret out wrongdoing absent some fact that would put a reasonable person on notice of a problem."); Ronald J. Colombo, LAW OF CORP. OFFS. & DIRS.: RTS., DUTIES & LIABS. § 2:18 (2018) ("In addition to liability for lack of care or bad faith in authorizing or making decisions, directors or officers may violate the duty of care and/or loyalty through lack of attention or failure to adequately supervise officers or employees or other neglect of duty. A claim based on lack of attention generally involves an allegation that the directors failed to focus on a particular matter, or failed to detect or prevent mismanagement by corporate officers or employees. Although widespread delegation of day-to-day corporate affairs is permissible, such delegation must be consistent with the director's exercise of due care.").

40. The specific acts and omissions of the 25 individual counter-defendants that establish their personal liability for Counts 2 through 5 are set forth below.

B. Discovery Control Plan

41. Defendants/Counter-Plaintiffs intend to conduct discovery under Level 3 of TEX. R. CIV. P. 190.3 and affirmatively plead that this suit is not governed by the expedited-actions process in TEX. R. CIV. P. 169 because Defendants/Counter-Plaintiffs seek monetary relief in excess of $100,000.

C. Relief

42. Defendants/Counter-Plaintiffs seek non-monetary relief and monetary relief over $1,000,000. TEX. R. CIV. P. 47(c)(5). The damages sought herein are within the jurisdictional limits of this Court.

D. Parties

43. Defendant/Counter-Plaintiff A.M. Peeler Ranch, LLC has an ownership interest in property subject to the disputes at issue and has appeared in this action through undersigned counsel.

44. Defendant/Counter-Plaintiff Alonzo M. Peeler, Jr., is an individual who currently resides at 100 La Parita Road, Jourdanton, Texas. Mr. Alonzo Peeler has an ownership interest in property subject to the disputes at issue. The last three digits of Defendant/Counter-Plaintiff Alonzo M. Peeler, Jr.'s driver's license number are 614. The last three digits of Defendant/Counter-Plaintiff Alonzo M. Peeler, Jr.'s Social Security number are 643. Mr. Alonzo Peeler has appeared in this case through undersigned counsel.

45. Defendant/Counter-Plaintiff Barbara Gene Peeler is an individual who currently resides at 100 La Parita Road, Jourdanton, Texas. She has an ownership interest in property subject

to the disputes at issue. The last three digits of Defendant Barbara Gene Peeler's driver's license number are 215. The last three digits of Defendant Barbara Gene Peeler's Social Security number are 989. Mrs. Peeler has appeared in this case through undersigned counsel.

46. Intervenor Jason Peeler is an individual who currently resides at 3007 FM 539, Floresville, TX 78114. Mr. Jason Peeler has an ownership interest in property subject to the disputes at issue. The last three digits of Mr. Peeler's driver's license number are 469. The last three digits of his Social Security number are 340. Mr. Jason Peeler has appeared in this case through undersigned counsel.

47. Counter-Defendant Kiewit Mining Group Inc., a foreign corporation authorized to do business in Texas, has appeared in this action through counsel.

48. Plaintiff/Counter-Defendant San Miguel Electrical Cooperative, Inc., a Texas corporation, has appeared in this action through counsel.

49. Counter-Defendant South Texas Electric Cooperative, Inc., a Texas corporation, has appeared through in this action through counsel.

50. Rolando Alaniz, an individual, may be served with process at counter-defendant's home in Hidalgo County at 1517 Blake Street, Mission, Texas, or wherever counter-defendant may be found.

51. Brad Bierstedt, an individual, may be served with process at counter-defendant's home in Wilson County at 156 Gentle Breeze, Floresville, Texas, or wherever counter-defendant may be found.

52. James Coleman, an individual, may be served with process at counter-defendant's usual place of business in Jackson County at Jackson Electric Cooperative, Inc., 8925 State Hwy 111 South, Ganado, Texas, or wherever counter-defendant may be found.

53. John Herrera, an individual, may be served with process at counter-defendant's home in Cameron County at 1415 Mesquite Grove, Brownsville, Texas, or wherever counter-defendant may be found.

54. Ron Hughes, an individual, may be served with process at counter-defendant's usual place of business in San Patricio, County at San Patricio Electric Cooperative, Inc., 402 E. Sinton Street, Sinton, Texas, or wherever counter-defendant may be found.

55. Michael Jacobs, an individual, may be served with process at counter-defendant's home in Brazoria County at 137 County Road 313, Sweeny, Texas, or wherever counter-defendant may be found.

56. Leroy Kaspar, an individual, may be served with process at counter-defendant's home in Wharton County at Rural Route 3 Box 229, El Campo, Texas, or wherever counter-defendant may be found.

57. Mike Kezar, an individual, may be served with process at counter-defendant's home in Bandera County at 1066 State Highway 173N, Bandera, Texas, or wherever counter-defendant may be found.

58. Dick Koop, an individual, may be served with process at counter-defendant's usual place of business/home in Jackson County at 508 Elizabeth Street, Edna, Texas, or wherever counter-defendant may be found.

59. Reynaldo Lopez, an individual, may be served with process at counter-defendant's home in Cameron County at 31223 Kretz Road, Los Fresnos, Texas, or wherever counter-defendant may be found.

60. Trace McCuan, an individual, may be served with process at counter-defendant's home in Nueces County at 14353 Cooperative Ave, Robstown, Texas, or wherever counter-defendant may be found.

61. Gary Rayborn, an individual, may be served with process at counter-defendant's usual place of business in Wharton County at Wharton County Electric Cooperative, 1815 E. Jackson Street, El Campo, Texas, or wherever counter-defendant may be found.

62. Mark Rollans, an individual, may be served with process at counter-defendant's usual place of business in Medina County at Medina Electric Cooperative, 2308 18th Street, Hondo, Texas, or wherever counter-defendant may be found.

63. David Rosse, an individual, may be served with process at counter-defendant's home in Kleberg County at 430 Rosse Rd., Kingsville, Texas, or wherever counter-defendant may be found.

64. Larry Schendel, an individual, may be served with process at counter-defendant's home in Karnes County at 13863 FM 627, Runge, Texas, or wherever counter-defendant may be found.

65. Marshall Shirley, an individual, may be served with process at counter-defendant's usual place of business in Grimes County at Mid-South Electric Cooperative, 7625 Highway 6, Navasota, Texas, or wherever counter-defendant may be found.

66. Leroy Skloss, an individual, may be served with process at counter-defendant's home in Karnes County at 801 Muecke Drive, Karnes, Texas, or wherever counter-defendant may be found.

67. Clyde Stewart, an individual, may be served with process at counter-defendant's usual place of business in San Patricio, County at San Patricio Electric Cooperative, Inc., 402 E. Sinton Street, Sinton, Texas, or wherever counter-defendant may be found.

68. Blaine Warzecha, an individual, may be served with process at counter-defendant's usual place of business in Victoria County at Victoria Electric Cooperative, 5502 US Hwy 59 North, Victoria, Texas, or wherever counter-defendant may be found.

69. Don Wehmeyer, an individual, may be served with process at counter-defendant's usual place of business in Victoria County at South Texas Electric Cooperative, 2849 Farm Road 447, Nursery, Texas, or wherever counter-defendant may be found.

70. Kenneth White, an individual, may be served with process at counter-defendant's home in Uvalde County at 4676 Ranch Road 1051, Uvalde, Texas, or wherever counter-defendant may be found.

71. Derrick Brummett, an individual, may be served with process at counter-defendant's home in Wilson County at 209 Oak Bend Drive, La Vernia, Texas, or wherever counter-defendant may be found.

72. Dave Burris, an individual, may be served with process at counter-defendant's home in Guadalupe County at 310 Burkwood Lane, Cibolo, Texas, or wherever counter-defendant may be found.

73. Dan Cates, an individual, may be served with process at counter-defendant's usual place of business in Atascosa County at San Miguel Electric Cooperative, 6200 FM 3387, Christine, Texas, or wherever counter-defendant may be found.

74. Nellie Frisbee, an individual, may be served with process at counter-defendant's home in Gillespie County at 115 Dian Drive, Harper, Texas, or wherever counter-defendant may be found.

E. Jurisdiction and Venue

75. The Court has subject matter jurisdiction over the lawsuit because the controversy exceeds this Court's minimum jurisdictional requirements.

76. Venue is mandatory in Atascosa County under TEX. CIV. PRAC. & REM. CODE § 15.011 because this suit is, in part, for damages to real property, and Atascosa County is where the property at issue is located.

F. Facts

Harmful Coal Ash Disposal Practices

77. Coal-fired power plants in the United States burn more than 800 million tons of coal every year, producing more than 110 million tons of solid waste in the form of fly ash, bottom ash, scrubber sludge and boiler slag. 80 Fed. Reg. at 21,302, 21,303 (Apr. 17, 2015).

78. Coal naturally contains trace amounts of many toxic chemicals, and these chemicals are concentrated in the solid waste when the coal is burned. 75 Fed. Reg. 35,128, 35,138 (June 21, 2010).

79. In addition, Clean Air Act regulations have required coal plants to capture increasing amounts of toxic emissions at the smokestack, like mercury and other heavy metals, and these pollutants, particulates, and sludge end up in the solid waste. *Id.* at 35,139.

80. Consequently, coal ash is a toxic brew of carcinogens, neurotoxins, and poisons—including arsenic, boron, cadmium, hexavalent chromium, lead, lithium, mercury, molybdenum, selenium and thallium. *See id.* at 35,139, 35,153, 35,168.

81. When this dangerous waste is not disposed of properly, the toxic chemicals are re-released to air, groundwater, surface water, and soil.

82. Coal-fired power plants dispose of coal ash primarily in two ways: by placing coal ash in dry landfills or by using water to facilitate the transport of ash to surface impoundments that store the mixture of water and ash. 80 Fed. Reg. at 21,303.

83. Both coal ash landfills and surface impoundments are likely to cause harmful contamination if operated without effective engineering controls, like impermeable liners, groundwater monitoring systems, and proper construction and maintenance to ensure structural stability. *Id.* at 21,327-28.

84. The disposal of coal ash and water in massive, dammed surface impoundments has led to catastrophic environmental destruction and substantial economic following the collapse of impoundments. 75 Fed. Reg. at 35,147. For example, the collapse of a dike at a coal ash impoundment at the Tennessee Valley Authority's Kingston Fossil Plant flooded 300 acres of a riverfront community with more than a billion gallons of toxic sludge. 80 Fed. Reg. at 21,313, 21,457 n.219. The disaster swept houses off their foundations, necessitated a multi-year cleanup costing more than $1.2 billion, and permanently displaced scores of families.

85. While catastrophic failures of coal ash impoundments often generate headlines, slow-moving coal ash disasters are more common. *See* 80 Fed. Reg. at 21,457. Disposal of coal ash in landfills and impoundments that lack composite liners to prevent leaking is a recipe for disaster because hazardous chemicals leak out of landfills and wet impoundments, poisoning underlying groundwater and nearby surface waters. 80 Fed. Reg. at 21,325.

86. In 2015, EPA adopted a federal rule to address the health and environmental damage posed by coal ash. 80 Fed. Reg. 21,302 (Apr. 17, 2015) (hereinafter "the 2015 CCR

Rule"). The 2015 CCR Rule provides critical and long-overdue protections for vulnerable communities living near coal ash dumps, for our air, and for our nation's waters, including those used for drinking water, recreation, economic activity such as fishing and tourism, and wildlife habitat.

87. For example, the 2015 CCR Rule required groundwater monitoring and reporting requirements for over a thousand coal ash disposal sites across the country. 40 C.F.R. § 257.90(e), 257.105(h)(1), and 257.107(h)(1) (requiring "annual groundwater and corrective action" reports posted on publicly available websites). The results were just recently posted in March 2018, and they dramatically reveal that groundwater at almost all coal ash sites is contaminated by toxic chemicals above levels that EPA has deemed safe for drinking water.[23]

88. A 2019 report analyzing all of the groundwater monitoring data that power companies posted on their websites in 2018 found that 91 percent of coal plants have unsafe levels of one or more coal ash constituents in groundwater, even after setting aside contamination that may be naturally occurring or coming from other sources, and determined that ***the San Miguel Power Plant had the worst contamination in the country***. SMECI's own testing reveals the groundwater beneath the Plant is contaminated with at least 12 pollutants, including cadmium (a probable carcinogen) and lithium (which can cause nerve damage) at concentrations 100 times above safe levels.[24]

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[23] *See* Matthew Brown and Sarah Rankin, *US Utilities Find Water Pollution at Coal Ash Dumps*, ASSOCIATED PRESS NEWS, (March 3, 2018), available at https://apnews.com/f3c75ee69bd7485590d467d76d766dfc (last visited Sept. 21, 2019).

[24] Environmental Integrity Project, *Coal's Poisonous Legacy, Groundwater Contaminated by Coal Ash Across the U.S.* (March 4, 2019; rev. July 11, 2019), available at https://www.environmentalintegrity.org/wp-content/uploads/2019/03/National-Coal-Ash-Report-Revised-7.11.19.pdf (last visited Sept. 21, 2019).

89. Coal-fired power plants also dispose of coal ash by returning it to the mine and dumping it into unlined mine pits, where the waste's toxic constituents can migrate unimpeded into groundwater.

90. While EPA acknowledged the damage nationwide from the dumping of coal ash in the absence of minimum federal protective standards, the 2015 CCR Rule explicitly exempted coal ash minefilling from its requirements and indicated that the Department of the Interior's Office of Surface Mining Reclamation & Enforcement ("OSMRE") was to take the lead in filling this regulatory gap. 75 Fed. Reg. 21,302.

91. In 2004, Congress directed the National Academies of Sciences ("NAS") to conduct a study to determine the health, safety, and environmental risks of coal ash minefilling. On March 1, 2006, the NAS published a report, "Managing Coal Combustion Residues in Mines," concluding that the practice poses significant risk to health and the environment.[25] The NAS concluded "the presence of high contaminant levels in many CCR leachates may create human health and ecological concerns at or near some mine sites over the long term." *Id.* at 3. The NAS found that hazardous constituents in coal ash could leach easily from unlined, fissured mine pits into groundwater, especially because mines are often excavated into or in close proximity to the water table. Contamination of the water table can adversely impact drinking water wells nearby or harm surface water fed by groundwater. In sum, the NAS concluded that disposing of coal ash in mines can cause unacceptable harm.

92. Despite the EPA's and NAS's explicit recommendations for federal action, OSMRE has not yet acted to establish national minimum standards. The Surface Mining Control

[25] Committee on Mine Placement of Coal Combustion Wastes, National Research Council, MANAGING COAL COMBUSTION RESIDUES IN MINES, available at http://www.nap.edu/catalog/11592.html (hereinafter "NAS Minefill Report") (last visited Sept. 21, 2019).

& Reclamation Act was passed in 1977 to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. § 1202(a). SMCRA establishes permitting, performance, and bonding requirements for the operation and reclamation of surface coal mining and the surface impacts of underground mining. 30 U.S.C. § 1201 *et seq.* Existing regulations under SMCRA establish safeguards for many aspects of coal mining and reclamation, but no regulations currently address the placement or disposal of coal ash in mines.

93. Dumping coal ash into mines is especially dangerous because mining often creates conditions that allow for more rapid contamination of adjacent groundwater.

94. Mining breaks up solid rock layers into small pieces, called spoil. Compared to the flow through undisturbed rock, water easily and quickly infiltrates spoil that has been dumped back into the mined-out pits. Fractures become underground channels that allow groundwater to flow rapidly offsite.

95. Unlike engineered landfills, which are lined with impervious membranes (clay or synthetic) and above water tables by law, coal ash dumped into mine pits continually leaches its toxic metals and other contaminants into the water that flows through and eventually leaves the site.

96. In addition to the fractured nature of the sites, the lack of impermeable barriers, and the frequent contact of the waste with groundwater, the changing pH of waters in mine environments poses complex problems for the placement of coal ash. Researchers recognize that metals and other toxic elements in coal ash leach into water under different chemical conditions, including when water has a change in pH. Under acidic conditions, metals that readily dissolve into water include cadmium, copper, lead, manganese, nickel, and zinc. Metals that leach into

water as pH increases from acid into neutral ranges include arsenic, selenium, antimony, hexavalent chromium, vanadium, molybdenum and boron. An even greater number of toxic trace elements leach when water changes from acidic to alkaline.

97. Contamination from coal ash minefill is often not discovered until many years after revegetation of the mine surfaces and after bonds have been released, meaning the landowner or community must cleanup wastes that remain chemically active for decades and threatened water resources well into the future. When contamination does occur at minefill sites, the fractured and spoil-filled nature of the sites makes remediation difficult or even impossible.

98. The sheer scale of many of these minefills is difficult to comprehend. In this case, the coal ash has been disposed in pits that are over 150 feet deep and span many thousands of acres over the Peeler Ranch and a portion of the former Abercrombie Ranch. Open mine pits currently have ash piles extending hundreds of feet into the air from ground elevation. The pits are open to the elements, so that wind can blow coal ash onto adjacent land and rain can infiltrate the coal ash. And the end pits are filled with water, so the ash is mixed directly with water in the fractured pit.

99. When suspended in the air as dust, coal ash is a serious health hazard. The inhalation of toxic dust from disposal, transport, and plant operations can cause serious injuries. When disposed, coal ash dust is emitted into the air by loading and unloading, transport, and wind. Once in the air, it can migrate off-site as fugitive dust. As a result, anyone nearby could be exposed to significant amounts of coarse particulate matter and fine particulate matter.

100. Coal ash dust is difficult to control—it is "hydrophobic," sometimes described as behaving like "dry water" and, because of its fine particle size, is easily deposited off-site and along transport routes, depositing on land and surface water. It contains crystallized silica, the culprit in the chronic lung disease, silicosis. When inhaled, with its small particle size, coal ash is

carried deep into the lungs and can irritate the respiratory system and worsen chronic lung disease. Toxins, such as arsenic and lead as well as radionuclides, are more concentrated in smaller particles.

101. EPA recognized that fugitive dust from coal ash disposal at both landfills and surface impoundments creates an unreasonable probability of adverse effects on health and the environment if not properly controlled. 80 Fed. Reg. at 21,386-88. EPA noted that its screening level analysis of the risks posed by fugitive dust from coal ash landfills indicated that, absent controls, dust levels at nearby locations could exceed the 24-hour Particulate Matter (PM) 2.5 National Ambient Air Quality Standard for fine particulates. *Id*. at 21,386. EPA also found that excessive cancer risks are associated with the inhalation of hexavalent chromium in coal ash fugitive dust. 80 Fed. Reg. at 21,386.

The Peeler Ranch

102. In 1900, at the age of 16, Alonzo Peeler, Sr., one of seven children born to Thomas Madison and Alice Jane Irvin Peeler, went to work for Captain W.S. Hall for the sum of fifty cents per day driving approximately 200-300 hogs to market in San Antonio. Four years later, Alonzo Peeler, Sr., began his own ranching activities, eventually amassing the approximately 25,000 acres now known as the A.M. Peeler Ranch near Christine, Texas (which includes some of his mother Alice Peeler's property along with portions of the old Hall Ranch).

103. The Peeler Ranch has been primarily a working cattle ranch and produced beef for market for over one-hundred years. Defendants/Counter-Plaintiffs Alonzo M. Peeler, Jr. (grandson of Alonzo M. Peeler, Sr., and Guinetta Andrews Peeler), and Barbara Gene Peeler have owned and managed the Peeler Ranch for the past sixty-four years.

104. Typical wildlife on the Peeler Ranch include whitetail deer, wild turkey, duck, dove, quail, wild hogs, javelina, alligators, and bass. The ranch has a Level III, Managed Lands Deer Permit issued through the Texas Parks and Wildlife Department.

105. The Peelers also use the ranch for their own recreation, hosting their family and the community for gatherings at the ranch headquarters. Five generations of Peelers have learned to fish, hunt, and raise cattle on the ranch.

History of the San Miguel Electric Cooperative, Inc.

106. SMECI is a domestic non-profit corporation that was created on February 17, 1977 for the purpose of owning and operating a 400 megawatt mine-mouth, lignite-fired generating plant and associated mining facilities that furnished electricity to Brazos and STEC.

107. On June 7, 1978, Brazos and STEC entered into wholesale power contracts with SMECI under which Brazos and STEC agreed to purchased, and SMECI agreed to sell, the entire output of the plant until the contract termination date. The contract provided that Brazos and STEC were responsible for SMECI's total costs of owning and operating the plant, including SMECI's debt obligations.

108. Construction of the Plant was initiated as a joint venture by Brazos and STEC in 1974. SMECI purchased the Plant and related mining facilities upon receiving long-term financing in 1978. Commercial operation of the Plant began on January 7, 1982.

109. As of December 31, 2015, STEC and its member cooperatives assumed 100% of the obligation for SMECI's project output and costs, including debt service.

110. SMECI historically served two customers equally: Brazos and STEC. Brazos and SMECI were in litigation in 2014 regarding Brazos' minimum scheduling requirements under its wholesale power contract. The litigation was settled in the fall of 2015. The settlement permitted

Brazos to exit SMEC by making a final payment to SMEC of $127,500,000 that was designed to cover its remaining debt, and Plant and Mine decommissioning costs. In return, SMECI assigned royalties from its oil and gas leases equally to STEC and Brazos.

111. Effective December 31, 2015, Brazos assigned all of its rights and obligations under its wholesale power contract to STEC. Brazos and its sixteen electric distribution cooperative members have withdrawn their membership from SMECI and no longer have members on the Board of Directors.

112. A membership meeting occurred on January 5, 2016, consisting of STEC and its eight members, to elect a new Board of Directors and adopt amended articles of incorporation and by-laws. The new 17-member Board of Directors of SMECI is made up of two representatives each from STEC's eight member cooperatives and one representative from STEC.

113. Also, as of December 31, 2015, STEC assumed 100% of the obligation for SMECI's project output and costs, including debt service, when Brazos assigned its wholesale power contract to STEC. The SMECI project is used to meet a portion of STEC's resource requirements and is scheduled as a baseload unit.

114. The current wholesale power agreement between STEC and SMECI, which extends to December 31, 2037 (as amended in 2009), obligates STEC for SMECI's total costs, including all debt (or similar) obligations, without limitation.

Mine and Plant Impact on the Peeler Ranch

115. Lignite mining on the Peeler Ranch started at the inception of the Mine operation in the early 1980's and ceased in January 2004. Approximately 4,000 acres of the Peeler Ranch were mined for lignite.

116. SMECI currently mines lignite from the Harrison Arrow S Ranch, which is adjacent to the Peeler Ranch, and other properties extending into northern McMullen County.

117. The Peeler Ranch remains encumbered by a Haul Road (which bisect the northeast, central, and southwest quadrants of the ranch), rail siding, and various access ramps associated with ongoing lignite mining on neighboring ranches, at least 10 electric transmission line easements associated with the Plant, water control facilities in the Mine filled with contaminated water, waste piles, and former mining land in need of reclamation, including open mine pits holding huge amounts of toxic coal ash and wastewater.

118. Previously "reclaimed" property on the Peeler Ranch shows evidence of subsidence and contamination from ash and other solid and hazardous waste disposed in the mine pits and then covered with soil and grass seed.

119. The Plant generates millions of tons of coal ash every year, which is stored is two Ash Ponds, an Equalization Pond, and an Ash Landfill on-site. The Ash Ponds and Equalization Pond are roughly forty years old and are little more than giant holes in the ground, which are routinely disturbed by a digger that removes the ash for disposal.

120. Recent testing required by the 2015 CCR Rule reveals significant contamination of the groundwater around the Plant by unsafe levels of constituents commonly found as a result of coal ash contamination, including: arsenic, beryllium, boron, cobalt, mercury, radium, selenium, sulfate, and thallium.[26]

Disposal of Other Solid or Hazardous Waste

[26] AECOM 2018 Annual Groundwater Monitoring Report § 257.90 for the Equalization Pond, Ash Pond, and Ash Pile at the San Miguel Plant, Revision 1, available at http://res.cloudinary.com/govimg/image/upload/v1552594142/5c702bd70d625c03864cdc9c/2018AnnualGroundwaterMonitoringReport.pdf (last visited Sept. 21, 2019).

121. According to publicly recorded deed records filed by SMECI, other solid wastes generated at the Plant and from mining activities were handled, stored, treated, transported, and/or disposed of in unlined landfills and a container storage area in the acreage in and surrounding the Mine and Plant, including: (1) waste oil from vehicle and equipment maintenance; (2) petroleum hydrocarbons and additives; (3) still bottoms generated from distillation of Stoddard solvent; (4) petroleum naphtha and hydrocarbons; (5) spray boot filter from maintenance painting; (6) paint-contaminated soil and sand; (7) hydrocarbon-contaminated expanded clay absorbent; (8) hydrocarbon-contaminated rags; (9) wastewater from ion-exchange units recharged with minerals from well water; (10) styrene and vivibenzene beads from ion-exchange resin; (11) scrap metal (steel, iron, aluminum, stainless steel, brass); (12) empty metal containers; (13) empty plastic or fiber containers; (14) non-friable cement-asbestos pipe and board; (15) scrap tire material; (16) rubber with steel wire and synthetic cord; (17) encapsulated asbestos and block-type insulation; (18) plant refuse from shipping, receiving and maintenance; (19) office refuse; (20) wood and lumber scrap; (21) ammonium hydroxide generated in blueprint duplication machine; (22) spent solvent; (23) paint and solvents; (23) still bottoms from distillation of methyl ethyl ketone; (24) peroxide with paint solids; (25) vehicle and equipment cleaning compound; (26) petroleum pitch; (27) trichloroethane; and (28) antifreeze.

122. These types of solid or hazardous wastes may leach volatile organic compounds, total petroleum hydrocarbons, and toxic metals into the soil, groundwater, and surface water. Contaminants that may be released from the wastes listed in the preceding paragraph include, among others: benzene, toluene, ethylene, xylene, acetone, methyl ethyl ketone, trichloroethane, naphthalene, gasoline range organics, diesel range organics, oil range organics, volatile petroleum hydrocarbons, extractable petroleum hydrocarbons, glycols, 2-butoxyethanol, ethylene glycol,

asbestos, polycyclic aromatic hydrocarbons (PAH), fluorene, herbicides and pesticides, aluminum, antimony, arsenic, barium, beryllium, boron, cadmium, chromium, cobalt, copper, cyanide, fluoride, iron, lead, lithium, manganese, mercury, molybdenum, nickel, nitrates, selenium, silver, strontium, sulfates, thallium, uranium, vanadium, and zinc.

The Peeler Ranch Mineral Lease

123. On August 15, 1953, A.M. Peeler (Alonzo M. Peeler, Sr.) entered into a Coal, Lignite and Mineral Lease for the benefit of James F. Gray ("Gray") for 4851.37 acres in Atascosa County, TX. *Coal, Lignite, and Mineral Lease from A.M. Peeler to James F. Gray*, August 15, 1953, Atascosa County, Texas, vol. 226, pp. 503-512.

124. The granting clause of the Mining Lease states:

> "Lessor . . . hereby grants, leases and lets exclusively unto Lessee for the purposes of entering upon, testing, investigating, exploring, prospecting, by use of core drills or otherwise, drilling, mining by sinking shafts or by strip mining methods, if practicable, producing, transporting coal, lignite, clay and other minerals (except oil or gas) rights of ingress and egress to, on, over and across the lands covered hereby or unitized herewith or adjoining thereto or that might be located in the general area thereof, for all such purposes, including, but not by way of limitation, the building of roads, railroads, tram rods, pipe lines, rights of way and necessary easements therefor, building power stations, electric or power transmission lines, pipe lines, telephone lines and other structures (including houses for employees) thereon, producing, saving, taking care of, storing, treating, processing, manufacturing and transporting coal, lignite, clay (except oil and/or gas) and other minerals and the power, products and derivatives thereof, and/or created therefrom . . ."

Id. at 503, ¶ 1.

125. The Mineral Lease provides that, "NOTWITHSTANDING, anything to the contrary in this lease hereinbefore or hereinafter provided, it is expressly agreed by and between the lessor and lessee that: a.) This lease shall cover only the coal, lignite, clay and other materials (except oil or gas) down to a depth of three hundred fifty feet below the surface and no further. . ." *Id.* at 506, ¶ 3(a) (emphasis in original); *see also id.* at 508, ¶ 3.

126. The term (*i.e.*, the length of duration) of the Mineral Lease is prescribed by its habendum clause, *see EnerQuest Oil & Gas, LLC v. Plains Exploration & Production Co.*, 981 F. Supp.2d 575, 585 (W.D. Tex. 2013), which provides that the lease shall remain in effect "so long as the rentals hereinafter provided for are paid and/or so long as coal, lignite, clay and other minerals (except oil and gas) are produced from said land hereunder or from the lands unitized therewith in whole or/in[sic] part, as herein provided."[27] *Id.* at 506, ¶ 5.

127. The payments contemplated by the Mineral Lease include rentals, royalties, and loss of use payments.[28]

128. During the primary term of the lease, prior to mineral production[29], the rental was set at fifty (50) cents per acre for a one (1) year period. Mineral Lease at 507, ¶ 2.

129. During the secondary term of the lease, once production began[30], the royalty was set at five (5) cents per gross ton for coal, lignite, clay and other minerals (except oil and gas). Mineral Lease at 507, ¶ 2.

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[27] The lands covered by the Peeler Ranch Mineral Lease have not been unitized with any other lands or leases. The lease provides that, "Any unit or units shall be created hereunder by lessee executing in writing an instrument identifying the mineral or minerals or formation or formations unitized and describing the acreage included in each unit and filing the same for record in the office of the County Clerk of the county in which said land or a part thereof is located." Mineral Lease at 508, ¶ 1. No such record has been filed with the Atascosa County Clerk's Office.

[28] The words "rental" and "royalty" have a definite and "well-understood meaning" in the mineral lease context. *Schittler v. Smith*, 101 S.W.2d 543, 544 (Tex. 1937). The term "rental" refers to the consideration paid to the Lessor for the privilege of postponing exploration ***during the primary lease term***. *See, e.g., EnerQuest Oil & Gas*, 981 F. Supp. 2d at 585, 602; *Griffith v. Taylor*, 291 S.W.2d 673, 676-77 (Tex. 1956); *Carroll v. Bowen*, 68 P.2d 772, 775 (Okla. 1937). The term "royalty" means a share of the product or proceeds therefrom, reserved to the owner for permitting another to use the property. *See, e.g., Griffith*, 291 S.W.2d at 676-77; *Hill v. Roberts,* 284 S.W. 246 (Tex. Civ. App. 1926).

[29] *See EnerQuest Oil & Gas*, 981 F. Supp. 2d at 585 (defining the "primary term" as the short time period to conduct necessary operations such that mineral "production will hold the lease into the secondary term).

[30] *See EnerQuest Oil & Gas*, 981 F. Supp. 2d at 585 (defining the "secondary term" as the period of time minerals are produced from the leasehold acreage).

130. If mining operations destroyed or deprived Lessor the use of the surface, Lessee agreed to pay lessor the sum of sixty ($60) dollars per acre, which is destroyed or rendered useless, "plus payments equal to the reasonable market value of any improvements destroyed or rendered useless." *Id.* at 509, ¶ 1.

131. The Mineral Lease does not include a shut-in royalty provision.[31]

Assignment of the Mineral Lease from Gray to R. Kyle DuVall

132. On August 14, 1956, Gray assigned an undivided one-half (1/2) interest in three Mineral Leases[32] to R. Kyle DuVall.

Assignment of the Mineral Lease from R. Kyle DuVall to J. Kyle DuVall

133. R. Kyle DuVall then assigned an undivided one-half (1/2) interest of the leases to J. Kyle DuVall, but that assignment is not publicly recorded.

Amendment 1 to the Peeler Mineral Lease

134. On August 5, 1966, Guinnetta A. Peeler, individually and as Independent Executrix of the Estate of A.M. Peeler, Deceased, and Alonzo M. Peeler, Jr., as the owners and holders of the title to the property covered by the Mineral Lease, signed Amendment 1 transferring the lease to the heirs of A.M. Peeler, ratifying the terms of the lease, and increasing the leased acreage to 4915.70 acres. Only Gray signed Amendment 1 as Lessee.

Assignment of the Mineral Lease from Gray, DuVall, and DuVall to BEPC and STEC

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[31] "A shut-in royalty clause allows a lessee to extend a lease beyond the primary term by paying a specified royalty if the well is capable of producing oil or gas but is not actually doing so—that is, if the well is 'shut in.'" *See, e.g., EnerQuest Oil & Gas*, 981 F. Supp. 2d at 586.

[32] The assigned leases included: (1) a Coal, Lignite, and Mineral Lease dated April 10, 1954, executed by Clifton Wheeler and Nora Wheeler, Lessors, in favor of Gray, Lessee, and of record in Volume 58, pages 278-284 of the Deed Records of McMullen County, Texas ("the Wheeler Mineral Lease"); (2) the Peeler Mineral Lease; and (3) a Coal, Lignite, and Mineral Lease dated August 15, 1953, executed by James P. Lewis and Eva Coe Lewis, Lessors, in favor of Gray, Lessee, and of record in Volume 225, pages 579-586 of the Deed Records of Atascosa County, Texas ("the Lewis Mineral Lease").

135. On April 5, 1972, Gray, DuVall, and DuVall, as the first parties, and BEPC and STEC, as the second parties, entered into a Contract and Agreement regarding assignment of four (4) San Miguel Lignite Deposit Leases, which included the Peeler, Wheeler, and Lewis Mineral Leases, along with one additional lease[33].

136. The Contract and Agreement provides that the first parties "shall assign" to the second parties "all of their right, title and interest under the San Miguel Lignite Deposit Leases to mine lignite thereon . . . ***for a term of ten (10) years from the effective date hereof and as long thereafter as lignite is mined from said Leases in paying quantities***." Gray to STEC Contract and Agreement at 2, ¶ 3 and 3, ¶ 2 (emphasis added). "Paying quantities" is defined as "no less than fifty thousand (50,000) net tons per calendar month." *Id.* at 3, ¶ 2.

137. The Contract and Agreement provides that second parties "shall observe all obligations toward landowners under the San Miguel Lignite Deposit Leases, including payment of rentals, royalties and surface damages, restoration of surface, etc., and shall indemnify and hold first parties harmless from all liability arising from its operations hereunder . . ." *Id.* at 9, ¶ 1.

138. On October 5, 1972, Gray, DuVall, and DuVall assigned their combined rights, titles, and interests in the Peeler, Wheeler, Lewis, and Henry Mining Leases to BEPC and STEC "for a term of ten (10) years and as long thereafter as lignite is mined from said Leases in 'paying quantities' as that term is defined in the afore-said Contract and Agreement."

Amendment 2 to the Peeler Mineral Lease

139. On September 23, 1975, the Peelers, on the one hand, and BEPC and STEC, on the other hand, signed Amendment 2, ratifying the terms of the amended lease, increasing the leased

[33] The additional lease was the Coal, Lignite, and Mineral Lease dated October 25, 1966, executed by George W. Henry, Lillian Henry, Ida Mae Henry, and Frankie L. Weed, in favor of Gray, Lessee, and of record in Vol. 313, pages 327-331 of the Deed Records of Atascosa County, Texas and the Volume 327, pages 164-169 of the Deed Records of McMullen County, Texas ("the Henry Mineral Lease").

acreage to 6062.94 acres of land, and amending certain provisions, as more fully described below. *Lease Amendment 2 from Alonzo M. Peeler, Jr. and Barbara Gene Peeler to BEPC and STEC*, September 23, 1975, Atascosa County, Texas, vol. 421, pp. 253-260

140. As further consideration of the amended lease, BEPC and STEC agreed to pay an advance royalty of ten ($10) dollars per acre on the acreage added by Amendment 2.[34]

141. Amendment 2 changed the royalty payments to twenty (20) cents per gross ton, instead of five (5) cents per gross ton, which was supposed to adjust in accordance with certain published indices and specified that a gross ton shall be computed at 2,000 pounds. *Id.* at ¶ 4.

142. The rental payment increased to two (2) dollars per acres from the previous rate of fifty (50) cents per acre. *Id.* at 281, ¶ 3.

143. Facilities clauses were added to the lease, providing "facilities to be place upon the leased premises covered by this lease ***shall be confined to those necessary for exploring, prospecting, mining, removing, stockpiling, storing and marketing the minerals granted, and transporting the same from said leased premises***." *Id.* at 282, ¶ 2 (emphasis added).

144. Lessees were granted the right "to use the premises and any mine shafts, pits, haulage ways, and other improvements and facilities on, in or under the premises for or in connection with ***mining, removing, and transporting*** of coal, lignite, clay and other minerals from other lands, ***and for the purpose of access to other lands***." *Id.* (emphasis added).

145. The Facilities clauses provide that use of water from the premises is not allowed unless Lessors provide written consent. *Id.* at ¶ 4.

[34] An advance royalty is a "bonus," or the cash consideration paid for the execution of the lease, in addition to royalties and rent, as an incentive for a Lessor to sign a mineral lease. *See, e.g., EnerQuest Oil &* Gas, 981 F. Supp. 2d at 602; *Griffith*, 156 Tex. at 6; *In re Estate of Slaughter*, 305 S.W. 3d 804, 811 (Tex. App. 2010). The advance royalty in Amendment 2, however, appears to be a literal "advance" on royalties because Lessees may recover the advance once production begins. *See* Lease Amendment 2 at 280, Para. 2.

146. Paragraph VII of the base lease and Paragraph 5 of Amendment 1 were replaced by Section VI of Amendment 2, which lays out the Lessees' reclamation obligations. Those include: (1) commencement of "operations to level and restore the surface thereof to the extent which is feasible and reasonably practicable" within six (6) months after abandoning any excavated area; (2) "diligently prosecut[ing] such operations to completion without undue delay," and (3) saving "any topsoil removed in the conduct of mining operations on the lands covered hereby" and replacing "on the surface such saved topsoil." *Id.* at 283, ¶ 2.

147. Further, "any materials returned from the plant site for burial in the excavated areas must be covered by at least ten (10 ft.) of subsoil immediately below the topsoil being replaced, in order to prevent any leaching of obnoxious acids or chemicals that might destroy the root system of any subsequent vegetation on the topsoil."[35] *Id.*

148. Lessees further agreed "to plant and/or sprig and establish a perennial grass selected by LESSORS, but of a variety adapted to this area, on the reclaimed surface." *Id.* at ¶ 3.

149. Amendment 2 also provided for payments for loss of use of acreage impacted by excavation or mining operations at a rate of two hundred ($200) dollars per acre per year, within thirty (30) days of being taken from control of the Lessors. If loss of use continues for more than four (4) years past the date on which the first payment is due, Lessees were to pay Lessors an additional fifty ($50) dollars per acre per year until Lessees "restored the surface to its original state and condition, and the use of the surface thereof restored to the LESSORS." *Id.* at ¶ 4.

[35] Amendment 2 is the first and only time the concept of returning coal ash from the plant to the mine is addressed in the base lease or any amendment, and it is raised in the context of Lessees' reclamation obligations. No right to dispose of coal ash returned from the plant to the mine is found in any granting clause. Further, there is no provision in the base lease or any amendment that discusses disposal of coal ash generated from lignite that was excavated somewhere other than the Peeler Ranch (*i.e.*, an off-tract property).

150. The loss of use payment is not to exceed five hundred ($500) per acre per year "or the reasonable market value of said land, whichever is higher." *Id.* at 284, ¶ 1. The maximum payment provision does not go into effect until after the Lessees "have made every reasonable effort to restore the surface of the land to its original state and condition." *Id.* The parties agreed the issue of *whether* the damaged lands have been restored to their original condition shall be determined by an Arbitration Committee. *Id.*

151. In addition, if Lessees destroy "any source of water on the leased premises," then Lessees have to provide a comparable source of water on the land at the discretion of the Lessors or Lessees "must replace such earthen reservoir or water well at the approximate same location where the same was destroyed upon completion of its mining operations hereunder." *Id.* at ¶ 2.

152. Lessees also agreed to pay ten ($10) dollars per acre as surface damage payments for acreage where structures, storing materials, or any other use deprives the surface owner the use of such lands. *Id.* at ¶ 4. At the end of use, Lessee must "restore the surface thereof to as near its original state and condition as possible." *Id.* at 285, ¶ 2.

153. At the termination of the Mineral Lease, Lessees retain the right to continue to use roadways, railroad rights of way, or other means of ingress and egress as necessary for the mining operations and removal of coal from other contiguous lands or lands in the same general area, upon the payment of ten ($10) dollars per acres per year for lands used for ingress and egress. *Id.* at 285, ¶ 1. At the end of use, Lessee must "restore the surface thereof to as near its original state and condition as possible." *Id.* at ¶ 2.

Amendments 3-4 to the Peeler Mineral Lease

154. On February 4, 1976, the Peelers, on the one hand, and BEPC and STEC, on the other hand, signed Amendment 3, ratifying the terms of the amended lease and increasing the leased acreage to 6182.94 acres of land.

155. On November 10, 1976, the Peelers, on the one hand, and BEPC and STEC, on the other hand, signed Amendment 4, ratifying the terms of the amended lease and increasing the leased acreage to 6280.04 acres of land.

Assignment of the Peeler Mineral Lease from BEPC and STEC to SMECI

156. On July 27, 1978, BEPC and STEC assigned all of their rights, titles, and interests in the Peeler, Wheeler, Lewis, and Henry Mineral Leases to SMECI, as successors-in-interest from Gray, DuVall, and DuVall. *Assignment from BEPC and STEC to SMECI*, July 27, 1978, Atascosa County, Texas, vol. 486, pp. 298-302.

Amendment 5 to the Peeler Mineral Lease

157. On June 12, 1978, the Peelers and SMECI signed Amendment 5, ratifying the terms of the amended lease and increasing the leased acreage to 6295.04 acres of land.

Amendment 6 to the Peeler Mineral Lease

158. On July 10, 1981, the Peelers and SMECI signed Amendment 6, ratifying the terms of the amended lease and making further amendments, as described further below. *Lease Amendment 6 from Alonzo M. Peeler, Jr. and Barbara Gene Peeler to SMECI*, July 10, 1981, Atascosa County, Texas, vol. 566, pp. 332-337.

159. Section VI of Amendment 2 regarding loss of use payments was amended to provide for two hundred ($200) dollars per acre where Lessee removes topsoil or substrata to construct water control facilities such as diversion ditches, dikes, and retention or sedimentation ponds, along with ten ($10) dollars per acre for adjacent side areas where natural vegetation is

removed. *Id.* at 333, ¶ 1-2. "Payment will continue until such time that vegetation is re-established and may again be utilized by Lessors." *Id.* at ¶ 2. The Lessee may use the water control facilities "until mining and reclamation activities are complete on Lessor's property or until the facility is no longer required by Lessee, whichever occurs first, referred to herein as the 'end date.'" *Id.* The reclamation deadline of the water control facilities is extended until two (2) years after the "end date." *Id.*

160. Amendment 6 also provides for an Emergency Waste Disposal Pit "to dispose of waste products generated by the San Miguel Plant, including bottom ash, fly ash and scrubber sludge" and payments for loss of use due to that facility. *Id.* at 333, ¶ 3 to 334, ¶¶ 1-2. Permit documents reveal the Emergency Waste Disposal Pit was not developed or was closed prior to use.

161. In addition, Amendment 6 set payments of ten ($10) per acre per year for the use of land utilized for temporary roads, all of which should be reclaimed as required by Amendment 2. *Id.* at 334, ¶ 3.

Amendment 7 to the Peeler Mineral Lease

162. On October 1, 1981, the Peelers and SMECI signed Amendment 7, ratifying the terms of the amended lease and increasing the leased acreage to 6300.28 acres of land.

Land Transfers, Including for the San Miguel Plant

163. On November 24, 1975, the Peelers sold 330 acres to BEPC and STEC to allow the companies to build the Plant. The Peelers retained a preferential right to repurchase the property should the Plant be abandoned or the property placed on the market for sale.

164. On October 29, 1976, the Peelers sold BEPC and STEC a 30-acre tract for a Mine Maintenance Facility, with rights of ingress and egress, and granted easements for the erection of

drag lines and the construction of the mine Haul Road (acreage was added to the Haul Road easement on January 18, 1980). The Peelers again retained a preferential right to repurchase.

165. On March 17, 1977, the Peelers sold BEPC and STEC land for the Plant road. On July 23, 1979, the Peelers sold SMECI land for an Electric Power Line Right of Way.

166. The Peelers also sold certain one-acre tracts to BEPC and STEC for water production wells.

The Buffer Zone Lease

167. On September 23, 1975, the Peelers signed a lease for a Buffer Zone of 902.73 acres surrounding the 330 acres previously sold for the Plant. The Lease makes the Buffer Zone available to Counter-Defendants BEPC and STEC (Lessees) for 50 years or until the plant is abandoned, whichever comes first. *Buffer Zone Lease – from Alonzo M. Peeler, Jr. and Barbara Gene Peeler to BEPC and STEC*, September 23, 1975, Atascosa County, Texas.

168. BEPC and STEC also assigned the Buffer Zone Lease to SMECI but remain liable under the explicit terms of the lease. *Id.* at Article X.

169. The Buffer Zone Lease requires that the Lessees "shall use reasonable diligence to comply with all present Federal and State regulations and standards for the design, construction and operation of said steam electric generating plant and fuel supply on the plant site including those for protection of the environment. . . Lessors, for themselves, their heirs and assigns, release and shall save and hold harmless the Lessees from all such damage, claims and losses occurring on the leased premises in connection with this reservation, ***except those arising out of acts of the Lessees, which may be willful or intentional, or in failing to use reasonable diligence as above provided for in this paragraph***." *Id.* at Article II at 4 (emphasis added).

170. The Buffer Zone Lease further provides that "[i]n the event that there is any permanent damage to the leased premises by virtue of any spills or any other contamination originating from the operations conducted by Lessees on the plant site or other operations in connection therewith, the Lessors herein shall be compensated by the Lessees for the reasonable market value of the land which is permanently damaged." *Id.* at Article VIII.

Lignite Mining Process

171. According to the United States Corps of Engineers ("USACE") Final Regional Environmental Impact Statement on Surface Coal and Lignite Mining in Texas, the three general phases of mining for lignite coal include: (1) construction or development activities; (2) operations or steady-state mining activities; and (3) closure and final reclamation activities.[36]

172. "The typical lag that would occur between the time mining commences for a given pit and the completion of rough leveling to approximate original contour, placement of suitable growth media, and seeding and planting would be approximately 2-5 years." *Id.* at 2-20.

173. Surface water control facilities are constructed in appropriate locations prior to initiation of construction to control runoff from disturbance areas and to control the quality of surface water discharge from the site. *Id.* at 2-10.

174. Prior to mining, ramps and main haul roads are constructed in the initial mine area, with additional ramps and haul roads being constructed incrementally over the life of the mine as the mine pits advance. *Id.* at 2-14.

[36] USACE, *Final Regional Environmental Impact Statement on Surface Coal and Lignite Mining in Texas*, Vol. I, p. 2-8 (April 2016), available at: https://www.swf.usace.army.mil/Portals/47/docs/regulatory/Permitting/Lignite%20Mining/Final_REIS_Volume_I.pdf (last visited Sept. 21, 2019).

175. In preparation for mining, "[o]verburden and interburden (the material to be removed above and between, respectively, the coal and lignite seams) [are] removed using draglines to uncover the coal or lignite seams. *Id.* at 2-8.

176. "Selective materials handling and testing [sh]ould be implemented to ensure placement of suitable growth media in the upper 4 feet of the reclaimed spoil material." Id. at 2-28. This means the topsoil and subsoil should be salvaged separately and segregated or stockpiled to be placed back (subsoil then topsoil) on regraded areas as part of the reclamation sequence. *Id.* at 2-11.

177. "Once an initial box cut (pit) is excavated, overburden and interburden from each subsequent pit would be backfilled into the previous pit and graded to approximate original contour. This surface then would be suitable for completion of reclamation procedures including rough and final grading, placement of growth media or prime farmland soils (as applicable), testing of growth media for suitability, seeding and planting, installation of permanent erosion control structures, and other final reclamation tasks." *Id.* at 2-9.

178. Post-mining topography should "approximate the general nature of the pre-mining topography and blend into the surrounding topography." *Id.* at 2-20.

179. "Spoils [sh]ould be selectively placed in backfill areas to ensure that naturally occurring acid- or toxic-forming materials are 4 feet or greater below the final grade." *Id.* at 2-27.

180. USACE determined that minefilling with coal ash is ***not typical*** in Texas and, therefore, did not evaluate the impacts of using coal ash in lignite mines.[37]

Discovery of Contamination

[37] USACE, *Final Regional Environmental Impact Statement on Surface Coal and Lignite Mining in Texas*, Vol. I, p. 2-8 (April 2016), available at https://www.swf.usace.army.mil/Portals/47/docs/regulatory/Permitting/Lignite%20Mining/Final_REIS_Volume_II_Appendices.pdf (last visited Sept. 21, 2019).

181. In November 2017, the Peelers engaged consultants to investigate possible sources of contamination on the ranch given apparent recent changes to the landscape, vegetation loss, water seepage, and a fish kill in a tank previously stocked with bass (confirmed by electric survey a few months prior). The consultants provided a report in January 2018 based on the preliminary field investigation, which detailed exceedances in soil/sediment samples of arsenic and selenium and exceedances in surface water samples of aluminum, arsenic, cadmium, calcium, iron, lead, magnesium, manganese, thallium, chloride, and sulfates. The report also determined the reclamation areas where the lignite mines were located did not have re-established vegetation typical of South Texas.

182. On April 3, 2018, SMECI notified Mr. Peeler that there was "a discharge of ash water from the lignite retention pond area near the southwestern corner of the plant property." The Peeler Ranch conducted its own investigation and discovered that 350,000 gallons of ash and water had been discharged over the Peeler Ranch.

183. On April 4, 2018, Mr. Peeler sent a letter to SMECI detailing his concerns with plant operations and how ash is being handled and disposed. The letter states: "It is time to have a serious conversation about the future of the plant and cleanup and removal of the ash, which has already contaminated the groundwater and soil on my property."

184. On June 20, 2018, the Peeler sent a letter to SMECI stating they would no longer accept annual rentals from SMECI and that the Mineral Lease term has ended.

185. On June 27, 2018, the Peelers discovered that SMECI was discharging wastewater from the holding pond along the Haul Road which is filled from the open mine pits. The wastewater was being discharged across the Peeler Ranch and flooded approximately 200 acres, including acreage outside the permit area, killing the grass. The Peelers requested that the Railroad

Commission of Texas ("RRC") investigated the release, but the RRC inspector Cade Harris informed the Peelers during his site visit that coal ash is not harmful, stating: "Your grandchildren can play in it."

186. The samples taken by the Peeler Ranch of the wastewater at the discharge point showed elevated levels of aluminum, boron, lithium, manganese, strontium, chloride, fluoride, and sulfates. This is *after* the dilution of the wastewater using Peeler Ranch well water, which Mr. Peeler does not authorize and is also a violation of SMECI's wastewater discharge permit. The soils in the area of the release show elevated levels of aluminum, arsenic, barium, boron, cobalt, iron, lithium, manganese, and strontium, which suggests repeated impacts over time.

187. On July 11, 2018, SMECI Fuels Manager Dave Burris called Mr. Peeler and asked to speak with him about his concerns. Mr. Peeler said he would speak with him but only with his attorney present. Mr. Burris responded that there was no point in talking.

188. On July 12, 2018, the Peelers discovered that SMECI was again discharging wastewater from the Mine across the Peeler Ranch and had turned over 250 acres into a mud flat with the flooding. SMECI ignored requests to stop the discharge and drained the entirety of Pond 7, which had been filled with contaminated wastewater prior to the discharge.

189. On August 14, 2018, the Court entered a Temporary Restraining Order ("TRO") allowing SMECI continued access to and use of the Peeler Ranch, subject to certain conditions and agreements, including (1) that SMECI is limited to discharging wastewater and depositing coal ash "in the ordinary course of business" and (2) that SMECI must give the Peeler Ranch advance notice of future wastewater discharges and deposits of coal ash.

190. While the Parties were appearing before the Court, SMECI had initiated a massive discharge of ***64,527,582*** gallons of contaminated wastewater across the Peeler Ranch, again

flooding over 200 acres of pastureland. The wastewater discharge lasted a total of 4.25 days, beginning the day before the hearing at 8:40AM on August 13 and concluding at 2:45PM on August 17. That amounts to a discharge of 10,500 gallons of wastewater per minute. This is an extraordinary volume of wastewater—equivalent to the volume of wastewater approximately 151,800 people generate each day, which is more than the population of Waco.[38]

191. The geophysical survey the Peelers conducted the following week revealed the area of the wastewater discharge is significantly contaminated. *See* Defendants'/Counter-Plaintiffs' Motion to Clarify or Amend the TRO, Exhibit B (Declaration of Anthony Brown). It is SMECI's stated intention reflected in filings with the RRC to continue to discharge similar volumes in an effort at "reclamation," making a bad situation worse. The permanence of the damage at issue was recognized by the United States Court of Appeals for the District of Columbia Circuit in its ruling on the federal rule regulating the disposal of coal combustion residuals: "it will ***not always be possible*** to restore groundwater or surface water to background conditions after a contamination event." *See* id., Attachment 2 to Whittle Decl. at p. 7 (emphasis added).

Notice of Eviction

192. The Mineral Lease granted a right to explore and produce lignite coal. SMECI ceased producing lignite from the Peeler Ranch in January 2004, and the last royalty payment pursuant to the Mineral Lease was paid by SMECI to the Peelers in February 2005.

[38] The population estimate of Waco for July 1, 2017 was 136,436. *See* United States Census Bureau, *QuickFacts, Waco, Texas*, available at: https://www.census.gov/quickfacts/fact/table/wacocitytexas/PST045217 (last visited Sept. 21, 2019). According to Texas Commission on Environmental Quality regulations, one person generates approximately 75-100 gallons of wastewater per day. *See* 30 TEX. ADMIN. CODE § 217.32(a)(3).

193. On August 15, 2005, SMECI paid the annual rental payment of $2.00 per acre, claiming the payment entitled SMECI to hold the entire Mineral Lease acreage, even though there was and is no possibility of producing any further lignite from the Peeler Ranch.

194. SMECI has continued to pay the annual rental payment of $2.00 per acre each year to hold the property for the purpose of using the Peeler Ranch as a dump site for coal ash waste from the Plant, even though the lignite burned at the Plant since January 2004 was mined from somewhere other than the Peeler Ranch and the Peelers will never receive any further benefit from the Mineral Lease because their lignite has been mined out.

195. Further, by claiming the Peeler Ranch as acreage it holds under lease, SMECI has access to groundwater from the Evergreen Groundwater District to which it would otherwise not be entitled.

196. Neither coal ash disposal nor water rights nor rights to dispose of other solid waste were the purpose of the Mineral Lease. Any implied easement of coal ash disposal as part of an easement of reasonable surface use was limited to lignite that originated on the Peeler leased tracts.

197. While the Mineral Lease habendum clause could be read literally to allow rental payments to extend the lease into perpetuity, despite the extended cessation of mineral production (*i.e.*, fourteen years of cessation with no possibility of future lignite production), the assignment from Gray and the DuValls to BEPC and STEC was limited to "ten years and for however long lignite is produced in paying quantities." SMEC did not have the right to extend the primary term of that assignment nor could it extend the term of the lease after lignite ceased being produced in paying quantities by returning to paying annual rentals. [39]

[39] Courts explicitly recognize that delay rentals can hold a mineral lease *only* during the primary term. *See, e.g., EnerQuest Oil & Gas*, 981 F. Supp. 2d at 585 ("if a lessee has not achieved actual production by the end of the primary term, or if actual production ceases during the secondary term—which lasts "as long as oil or gas is produced"—the lease automatically terminates."); *Morriss v. First Nat. Bank of Mission*, 249 S.W.2d 269, 279 (Tex. Civ. App. 1952)

198. Further, the leasehold estate acquired by Gray and his assigns was a determinable fee, which was lost on the cessation of the use of the Peeler land for the purposes of lignite exploration, development, or production. *See W.T. Waggoner Estate v. Sigler Oil Co.*, 19 S.W.2d 27, 28–29 (1929). The only easement that remains is the right of ingress and egress to contiguous properties.

199. On June 20, 2018, Mr. and Mrs. Peeler gave notice to SMECI that they would no longer accept any further delay rental payments purporting to extend the Mineral Lease and that the lease term has ended. The final rental period ended on August 14, 2018.

200. Even if the Peelers' acceptance of the $2.00 per acre per year delay rental payments after the lignite was mined to extinction impliedly extended the term of the Mineral Lease, that extension ended on August 14, 2018. If, in the alternative, the rental payments accepted after the end of the Mineral Lease created a periodic tenancy or rendered SMECI a bare licensee, the term of the tenancy or the license expired on August 14, 2018.

201. On August 10, 2018, counsel for the Peelers sent counsel for SMECI a letter explaining the terms of SMECI's lock out ***from the Mineral Lease acreage*** of the Peeler Ranch and informing them that the Peelers will begin a thorough site investigation of the contamination caused by the Mine and Plant operations starting August 20, 2018. The Peelers never threatened to lock SMECI out of the Plant. In exchange for access to and sampling from the groundwater

(". . . option to pay rentals ordinarily will delay operations as long as rentals are paid, but not beyond the primary term."); *State ex rel. Claugus Family Farm, L.P. v. Seventh Dist. Court of Appeal*s, 47 N.E.3d 836, 842 (Ohio 2016) (holding delay-rental provisions apply only during the primary term of a lease and that a lease cannot be extended without production of minerals); *Hite v. Falcon Partners*, 13 A.3d 942, 950 (Pa. Super. App. 2011) (holding that once primary term ended and mineral production failed to commence, the lease agreements expired); *Vaughn v. Hearrell*, 347 S.W.2d 542, 544 (Ky. 1961) ("It appears to be the general rule that the dry-hole and delay-rental clauses of the standard oil and gas lease contract are intended to keep it in force only within the primary term. SUMMERS ON OIL AND GAS, Vol. 2, sec. 302, pp. 278–9.")

monitoring wells installed on the Plant site, the Peelers offered to share samples with SMECI to conduct its own testing.

Ongoing Site Investigation

202. The Peelers have conducted surface soil and water sampling with laboratory analysis along with geospatial and historical photographic analysis to confirm apparent contamination of the property from Counter-Defendants' actions.

203. After the Court entered the TRO in August 2018, the Peelers and SMECI both sampled the groundwater monitoring wells in the Mine area on the Peeler Ranch, and the Peelers conducted an extensive geophysical survey of the ranch to find contamination signatures, which the Peelers have provided the parties and the State of Texas.

204. Currently, SMECI is conducting a groundwater evaluation around the Plant pursuant to the Texas Risk Reduction Program as a result of demonstrated exceedances in groundwater of Radium, Lithium, and Mercury.

205. The Peelers have been collecting soil and split groundwater samples with SMECI around the Plant, and the Peelers will engage in more extensive soil and groundwater sampling in the Mine area and extending further from the Plant the coming months. Full site characterization is ongoing.

Roles of the Boards of Directors and Senior Staff

206. In accordance with the ECCA and its own by-laws, SMECI has a board of directors. The board is made up of members of SMECI and, in particular, by people who also are directors or senior management at other electric cooperatives in Texas.[40]

[40] **Brad Bierstedt** serves as General Manager of Karnes Electric Cooperative, Inc.
James Coleman serves General Manager/CEO of Jackson Electric Cooperative, Inc.
John Herrera serves as General Manager of Magic Valley Electric Cooperative, Inc.
Ron Hughes serves as General Manager of San Patricio Electric Cooperative, Inc.

207. The board was large – 26 members – but as late as 2015 was reduced in size to 17 members in 2016 (and remains that size today). Of those 17 members, a majority (9) are also members of the board of directors of STEC.

208. One board member serves as the president of the SMECI board. Other board members serve as vice president, treasurer, and secretary. The board also works through committees, including an operating committee and finance/employee compensation committee.

209. In addition to the board, SMECI has senior management (also called "senior staff"), including a General Manager, Plant Manager, Fuels Manager, and an Administrative Services Manager. An attorney also serves a general counsel. These members of senior management attend the monthly board meetings and brief the members of board and committees concerning their areas of responsibility at SMECI.

210. The full board meets monthly, usually at a hotel in San Antonio. The meetings usually have lasted only between 30 and 60 minutes. Committee meetings typically last longer, but those meetings, too, often have been less than 60 minutes in duration. Each month, when senior management briefs the board or committee members, there are "plant performance" and "environmental" updates.

211. Although SMECI's board of directors is, by the mandate of both the ECCA and its by-laws, responsible for managing the cooperative, in reality the board has delegated the overwhelming majority of management to the senior staff. Tellingly, SMECI's website, under

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Mike Kezar serves as General Manager of South Texas Electric Cooperative, Inc.
Trace McCuan serves as CEO of Nueces Electric Cooperative, Inc.
Gary Raybon serves as General Manager/CEO of Wharton County Electric Cooperative, Inc.
Mark Rollans serves as CEO of Medina Electric Cooperative, Inc.
Blaine Warzecha serves as General Manager of Victoria Electric Cooperative, Inc.

All of the other individual board of director counter-defendants have served as directors on the boards of other Texas electric cooperatives.

"Our Leadership,"[41] lists Counter-Defendants Brummett, Burris, Cates, and Kezar as "management" and separately lists the sixteen of the seventeen directors under "Board of Directors."[42] The directors on SMECI's board are, in the words of Fuels Manager Dave Burris, "ranchers." *Deposition of Dave Burris*, June 27, 2019, at 245:15. Furthermore, according to the SMECI's general counsel:

> The SMEC board of directors oversees the management of SMEC. . . . In my experience with SMEC, ***the SMEC board does not initiate agenda items or proposals***. Rather, the SMEC board responds to proposals put forward by management. While board members could raise issues of concern with management or direct management to take certain actions, in my experience with SMEC, ***agenda items for the board to consider at its meetings are set by management rather than the board***. The board members do not manage SMEC's day-to-day operations. While they take their responsibility to SMEC seriously, ***their job it to prove high-level oversight and direction, not to make everyday decisions or take on the role of management and employees***.[43]

G. Limitations

212. The Peelers' counterclaims arise out of the same transactions or occurrences that are the bases of SMECI's Original Petition (as well as its live pleading, *i.e.*, SMECI's Third Amended Petition), so limitations do not apply to Plaintiffs/Counter-Defendant SMECI for Counts 1-5. TEX. CIV. P. & REM. CODE § 16.069. Texas cases interpreting section 16.069(a) hold that a claim raises out of the same transaction or occurrence if it has "a logical relationship to the dispute" that is the basis of the plaintiff/counter-defendant's lawsuit. "To be logically related, the essential facts on which the counterclaim is based must be significantly and logically relevant to both

[41] *See* http://www.smeci.net/about-us/our-leadership (last visited September 21, 2019).

[42] As discussed above, based on SMECI's amended and restated 2016 by-laws, Mike Kezar, as STEC's general manager, serves as the seventeenth member of SMECI's board of directors.

[43] July 2, 2019 Affidavit of Wilhelm Liebmann (emphasis added).

claims."[44] Under this test, "a 'transaction' is flexible and may constitute a series of many occurrences logically related to one another." *See Wells v. Dotson*, 261 S.W.3d 275, 281 (Tex. App.-Tyler 2008).

213. Because STEC is vicariously liable for SMECI as its alter-ego, SMECI's filing of the initial lawsuit against the Peelers should be imputed to STEC for purposes of TEX. CIV. P. & REM. CODE § 16.069.

214. Furthermore, because the individual SMECI directors and management in place in August 2018 approved filing the lawsuit against the Peelers, SMECI's filing of the initial lawsuit against the Peelers should be imputed to the individual Counter-Defendants for purposes of TEX. CIV. P. & REM. CODE § 16.069.

215. Moreover, the discovery rule should apply to toll limitations against all Counter-Defendants for all counts because SMECI had a contractual responsibility under the Mineral Lease to return the site to its previous condition and under the Buffer Zone Lease to comply with state and federal environmental laws. The Peelers justifiably relied on Counter-Defendants' reclamation expertise and contractual obligations. The contamination that has resulted from Counter-Defendants' actions and the difficulty (if not impossibility) of returning the Peeler Ranch to its previous state and condition was inherently undiscoverable and is objectively verifiable, in part because mining necessarily destroys the property, so the Peelers could not have known that reclamation had been postponed too long for full restoration or that SMECI's wastewater management practices were causing harm that could not be undone. As recently as June 29, 2018,

[44] *See, e.g.*, *Aguilar v. Sinton*, 501 S.W.3d 730 (Tex. App.-El Paso 2016) (citing *Freeman v. Cherokee Water Co*., 11 S.W.3d 480, 483 (Tex. App.-Texarkana 2000), and *Commint Technical Servs., Inc. v. Quickel,* 314 S.W.3d 646, 653 (Tex. App.-Hou. [14th Dist.] 2010); *see also Rahlek, Ltd. v. Wells*, __S.W.3d__, 2019 WL 2220600, at *12 (Tex. App.-Eastland May 23, 2019) ("Texas courts apply a 'logical relationship' test to determine whether a counterclaim arises out of the same transaction or occurrence that is the basis of the underlying cause of action. *Allen Drilling Acquisition Co. v. Crimson Expl. Inc*., 558 S.W.3d 761, 775 (Tex. App.-Waco 2018) (op. on reh'g)); . . . *Williams v. Nat'l Mortg. Co*., 903 S.W.2d 398, 403–04 (Tex. App.-Dallas 1995).).

personnel from the RRC dismissed the Peelers' concerns regarding the apparent changes in the property from the ash disposal and wastewater discharge practices, claiming coal ash is safe and approving the massive discharges over the Peeler land as allowed by permit. Unknown to the Peelers, the RRC had approved a post-mine land use change of the Peeler Ranch from pastureland to industrial/commercial without the required landowner consent. As described above, the Peelers were not aware of the widespread contamination until after March 2018, when SMECI notified the Peelers of a coal ash spill from the Plant and also published its 2018 Groundwater Monitoring Report on the SMECI website as required by the federal CCR Rule, which prompted the Peeler Ranch to conduct its own further investigation of the Mine areas.

216. In addition, the statute of limitations should not apply to the Peelers' claims against SMECI, STEC, or the individual Counter-Defendants because SMECI fraudulently concealed the ongoing contamination to the Peeler Ranch from the Mine and Plant activities. SMECI had actual or constructive knowledge of the dangers of improper handling and disposal of coal ash and wastewater and knew, or had reason to know, that the Peeler Ranch was being harmed by their handling, storage, treatment, transportation, and disposal of coal ash, wastewater, and other solid or hazardous waste and concealed those facts in order to deceive the Peelers. Since at least 2004, SMECI has been evaluating impacts to the Peeler Ranch from SMECI's wastewater disposal practices in the Mine and the Plant. SMECI has developed alternatives and cost-estimates for addressing the pollution and presented those alternatives to the SMECI Board of Directors on many occasions over the years. Yet, SMECI has never taken action to respond to the pollution or told the Peelers about the complexity of the problems. Instead, SMECI senior staff, including Nellie Frisbee, repeatedly have assured Mr. Alonzo Peeler that: "We will take care of it." More specifically, SMECI knew that its surface impoundments and landfill at the Plant were causing

contamination of the groundwater underneath the Peeler Ranch since at least May 2016, when SMECI began testing pursuant to the CCR Rule. SMECI also has been diluting the wastewater in the Mine water control pits prior to discharge over the Peeler Ranch to conceal how toxic the water has become (and to appear to comply with permit requirements), notwithstanding that dilution prior to testing for hazardous metals is not allowed under Texas law.

217. Finally, the continuing tort doctrine should apply to toll limitations for Counts 2-5 against all Counter-Defendants because Counter-Defendants' tortious conduct was (and is) multi-faceted and caused (and continues to cause) numerous discrete injuries to the Peelers' land and water (both groundwater and surface water). There has been no single tortious act; there have been countless discrete torts causing *countless* and ongoing injuries to the Peelers' land and water. A limitations bar should not apply in this case

H. Causes of Action

COUNT 1 – BREACH OF CONTRACT (PLAINTIFF/COUNTER-DEFENDANT SMECI AND COUNTER-DEFENDANT STEC)

218. The preceding paragraphs are incorporated herein by reference as if fully set forth below.

219. Counter-Defendants SMECI and STEC have breached their contractual obligations under (1) the Mineral Lease and (2) the Buffer Zone Lease.

The Mineral Lease

220. As detailed above, on August 15, 1953, A.M. Peeler and Gray executed the Mineral Lease covering 4851.37 acres in Atascosa County, TX. The base lease has been amended seven (7) times with the leased acreage now totaling 6300.28 acres.

221. Plaintiff/Counter-Defendant SMECI is the successor-in-interest to the original lessee Gray and signed Amendment 6 and Amendment 7 as Lessee, ratifying all the lease terms

and accepting all lease obligations. The Mineral Lease and Amendments 1-7 each comprise valid contracts between the Peelers, on the one hand, and SMECI, on the other.

222. The amended Mineral Lease includes several provisions, including Lessees' obligations to: (1) commence "operations to level and restore the surface thereof to the extent which is feasible and reasonably practicable" within six months after abandoning any excavated area; (2) "diligently prosecute such operations to completion without undue delay"; and (3) save "any topsoil removed in the conduct of mining operations on the lands covered hereby" and replace "on the surface such saved topsoil." Amendment 2, Section VI at 283, ¶ 2.

223. Further, "any materials returned from the plant site for burial in the excavated areas must be covered by at least ten feet (10 ft.) of subsoil immediately below the topsoil being replaced, in order to prevent any leaching of obnoxious acids or chemicals that might destroy the root system of any subsequent vegetation on the topsoil." *Id.*

224. In addition, Lessees are required "to plant and/or sprig and establish a perennial grass selected by [the Peelers], but of a variety adapted to this area, on the reclaimed surface." *Id.* at ¶ 3.

225. Amendment 2 also provides for payments for loss of use of acreage impacted by excavation or mining operations at a rate of two hundred ($200) dollars per acre per year, within thirty (30) days of being taken from the Peelers' control. If loss of use continues for more than four (4) years past the date on which the first payment is due, then Lessees must pay the Peelers an additional fifty ($50) dollars per acre per year until Lessees have "restored the surface to its original state and condition, and the use of the surface thereof restored to the [Peelers]." *Id.* at ¶ 4.

226. The loss of use payment is not to exceed five hundred ($500) per acre per year "or the reasonable market value of said land, whichever is higher." *Id.* at 284, ¶ 1. The maximum payment provision does not go into effect until after Lessees have "made every reasonable effort to restore the surface of the land to its original state and condition." *Id.*

227. In addition, if Lessees destroy "any source of water on the leased premises," then Lessees must provide a comparable source of water on the land at the discretion of the Peelers or Lessees "must replace such earthen reservoir or water well at the approximate same location where the same was destroyed upon completion of its mining operations hereunder." *Id.* at ¶ 2.

228. Lessees also must pay ten ($10) dollars per acre as surface damage payments for acreage where structures, storing materials, or any other use deprives the Peelers the use of such lands. *Id.* at ¶ 4. At the end of use, Lessees must "restore the surface thereof to as near its original state and condition as possible." *Id.* at 285, ¶ 2.

229. At the termination of the Mineral Lease, Lessees retain only the right to continue to use roadways, railroad rights of way, or other means of ingress and egress as necessary for the mining operations and removal of coal from other contiguous lands or lands in the same general area, upon the payment of ten ($10) dollars per acres per year for lands used for ingress and egress. *Id.* ¶ 1. At the end of use, Lessees must "restore the surface thereof to as near its original state and condition as possible." *Id.* at ¶ 2.

230. Section VI of Amendment 2 regarding loss of use payments was amended in Amendment 6, which was signed only by SMECI and the Peelers, to provide for two hundred ($200) dollars per acre where SMECI removes topsoil or substrata to construct water control facilities such as diversion ditches, dikes, and retention or sedimentation ponds, along with ten ($10) dollars per acre for adjacent side areas where natural vegetation is removed. Amendment 6

at 333, ¶ 1-2. "Payment will continue until such time that vegetation is re-established and may again be utilized by [the Peelers]." *Id.* at ¶ 2.

231. According to Amendment 6, SMECI may use the water control facilities "until mining and reclamation activities are complete on [the Peelers'] property or until the facility is no longer required by [SMECI], whichever occurs first, referred to herein as the 'end date.'" *Id.* The reclamation deadline of the water control facilities is extended until two (2) years after the "end date." *Id.*

232. Finally, Amendment 6 set payments of ten ($10) per acre per year for SMECI's use of land utilized for temporary roads, all of which should be reclaimed as required by Amendment 2. *Id.* at 334, ¶ 3.

233. The Peelers have performed fully their Mineral Lease obligations and have relied on SMECI's repeated reassurances that reclamation would commence "soon" and that the property would be restored to its original state and condition.

234. SMECI and STEC have not performed their reclamation and damage payment obligations under the amended Mineral Lease. SMECI and STEC have failed to: (1) commence reclamation within six months of abandonment of any excavated area, (2) diligently prosecute reclamation without undue delay, or (3) level and save and replace removed topsoil. Further, SMECI and STEC have disposed (or allowed to be disposed) coal ash and other solid or hazardous waste in the mine pits and on the Peeler Ranch in violation of the express lease terms and in violation of the implied easement of reasonable surface use.

235. In addition, SMECI and STEC have failed to level and restore the excavated areas of the Peeler Ranch and sprig and establish grasses selected by the Peelers. SMECI and STEC have destroyed water sources (or allowed water sources to be destroyed), failed to comply with

the replacement and restoration provisions, and have not tendered sufficient surface damage payments in accordance with the contract schedule.

236. Finally, to avoid triggering the closure obligations for the water control facilities in Amendment 6, SMECI has unreasonably delayed reclamation on the Peeler Ranch, thereby causing further damage to the property.

237. The Peelers have been injured by SMECI and STEC's contractual breaches through: (1) widespread contamination of and damage to the Peeler Ranch; (2) loss of use due to delay in reclamation and restoration of the Peeler Ranch; (3) loss of the damages payments to which they are contractually entitled; and (4) exposure to long-term or perpetual environmental liability.

238. To remedy SMECI and STEC's breaches, the Peelers are entitled to specific performance of the lease provisions, including immediate commencement of full reclamation and restoration of the damaged areas of the Peeler Ranch (including impacted areas outside the leased acreage). This necessarily will require the complete removal of any and all coal ash and any other solid or hazardous waste, which were placed in a manner inconsistent with the lease provisions and contrary to the implied easement of reasonable surface use and have caused widespread contamination.

239. The Peelers are also entitled to loss of use payments equal to the fair market value of the leased acreage. In the event that restoration efforts fail to return the property to its original state and condition, the Peelers are also entitled to compensation for any reduction in fair market value of the Peeler Ranch.

240. In addition, the Peelers are entitled to a release from any further obligations in the Mineral Lease, excepting only SMECI's use of the Haul Road for ingress and egress to contiguous properties for mining purposes.

241. Further, because of SMECI and STEC's failure to honor their contractual obligations, the Peelers are entitled to recover their reasonable attorney's fees under TEX. CIV. P. & REM. CODE § 38.002, and court costs.

The Buffer Zone Lease

242. As described above, on September 23, 1975, the Buffer Zone Lease was executed by and between the Peelers and BEPC and STEC for a term of 50 years or until the plant is abandoned. Thus, the Buffer Zone Lease comprises a valid contract between the Peelers, on the one hand, and BEPC and STEC, on the other.

243. SMECI is the successor-in-interest to the original lessees by assignment. STEC remains liable under the lease pursuant to its explicit terms.

244. The Buffer Zone Lease provides that the Lessees will use "reasonable diligence to comply with all present Federal and State regulations and standards for the design, construction and operation of said steam electric generating plant and fuel supply on the plant site including those for protection of the environment." Buffer Zone Lease, Article II at 4.

245. The assumption of risk and release the Peelers agreed to in the Buffer Zone Lease does not apply to act of the Lessees "which may be willful or intentional" or where Lessees fail to use the reasonable diligence described above. *Id.*

246. The Buffer Zone Lease also provides: "In the event that there is any permanent damage to the leased premises by virtue of any spills or any other contamination originating from the operations conducted by Lessees on the plant site or other operations in connection therewith,

the [Peelers] shall be compensated by Lessees for the reasonable market value of the land which is permanently damaged." *Id.,* Article VIII at 6-7.

247. The Peelers have performed fully their Buffer Zone Lease obligations.

248. STEC and SMECI have failed to perform their material contractual obligations under the Buffer Zone Lease. For example, STEC and SMECI have not used "reasonable diligence to comply with all present Federal and State regulations and standards for the design, construction and operation of said steam electric generating plant and fuel supply on the plant site including those for protection of the environment."

249. Instead, SMECI and STEC have violated and continue to violate multiple provisions of the CCR Rule, which applies to the surface impoundments and landfill at the San Miguel Power Plant. *See* 80 Fed. Reg. 21,302. SMECI and STEC, therefore, have violated and continues to violate RCRA's prohibition on open dumping, 42 U.S.C. § 6945(a), (d)(6). *See* 40 C.F.R. § 257.1(a)(1)-(2) (facilities and practices failing to satisfy the CCR Rule are open dumps and are engaged in open dumping).

250. In addition, SMECI and STEC have violated and continue to violate the Clean Water Act as a result of unpermitted discharges from the Plant's surface impoundments and landfill to waters of the United States, including on or around March 21-April 11, 2015; April 18-May 1, 2015; Mary 12-18, 2015 March 31, 2018, and July 30, 2019.

251. Moreover, in spite of actual knowledge of such contamination as early as May 2016—when SMECI and STEC began testing the groundwater pursuant to the CCR Rule—of groundwater contamination and releases from the surface impoundments and ash landfill, SMECI and STEC failed to notify the Peelers of this contamination. SMECI has developed multiple proposals including cost estimates since as early as 2015 for closing or retrofitting the leaking ash

impoundments and has deliberately chosen to take no action. SMECI also investigated and developed remediation proposals to restore the Peeler Ranch acreage impacted by the Plant discharges as early as June 13, 2003 and has deliberately chosen to take no action or inform the Peelers about the results of the investigation or the cost to restore the ranch property at that time. As a result of SMECI's deliberate inaction, the pollution and damage has spread and may no longer be able to be corrected. SMECI and STEC's continued unlawful operation of the surface impoundments in spite of the known ongoing harm to the leased acreage and groundwater surrounding the Plant is intentional and willful and violates their contractual obligations under the Buffer Zone Lease.

252. The Peelers have been injured by STEC and SMECI's contractual breaches through: (1) widespread contamination of and damage to the Peeler Ranch; (2) loss of use due to the contamination of soil, surface water, and groundwater; (3) loss of the damages payments to which they are contractually entitled; and (4) exposure to long-term or perpetual environmental liability.

253. To compensate for STEC and SMECI's violation and abrogation of their Buffer Zone Lease obligations, the Peelers are entitled to specific performance, including, but not limited to, full cleanup and restoration of the leased acreage, surface water, and groundwater, including closure of the unlawful leaking impoundments and landfill.

254. The Peelers are also entitled to loss of use payments equal to the fair market value of the leased acreage. In the event restoration efforts are not successful at returning the property to its original state and condition, the Peelers are entitled to compensation for any reduction in fair market value of the Peeler Ranch.

255. In addition, the Peelers are entitled to a release from any further obligations in the Buffer Zone Lease.

256. Further, because of STEC and SMECI's failure to honor their contractual obligations, the Peelers are entitled to recover its reasonable attorney's fees under TEX. CIV. P. & REM. CODE § 38.002, and court costs.

COUNT 2 – TRESPASS TO REAL PROPERTY

(PLAINTIFF/COUNTER-DEFENDANT SMECI, COUNTER-DEFENDANTS KIEWIT AND STEC, AND 25 INDIVIDUAL DEFENDANTS)

257. The preceding paragraphs are incorporated herein by reference as if fully set forth below.

258. Plaintiff/Counter-Defendant SMECI and Counter-Defendant STEC entered and/or continues to enter property owned by the Peelers by:

a. discharging wastewater from the Plant to the Peeler Ranch through unpermitted discharges, including (but not limited to) on or around March 21-April 11, 2015; April 18-May 1, 2015; Mary 12-18, 2015; March 31, 2018; and July 30, 2019;

b. allowing wastewater contained in the surface impoundments at the Plant to leak into groundwater and surface water on the Peeler Ranch on an ongoing basis for many years;

c. allowing stormwater runoff and leachate to run onto the surface and leak into groundwater and surface water on the Peeler Ranch on an ongoing basis for many years;

d. storing contaminated wastewater in Ramp Pits 8 and 10 and such that the wastewater seeps through the soil on the Peeler Ranch and daylights in low areas, killing vegetation from approximately 2009 to present day;

e. pumping the wastewater that has infiltrated the soils in Area A from one pond to another in Area A, thereby allowing it to spread through the soils and groundwater in the Peeler Ranch from approximately 2009 to present day;

f. discharging massive quantities of contaminated wastewater across the Peeler Ranch outside the mine permit boundary, including on or about June 27, July 12, and August 14, 2018 for multiple days at a time;

g. violating the implied easement of reasonable surface use in the Mineral Lease by storing and disposing on the Peeler Ranch coal ash waste resulting from lignite mined from off-tract properties; and

h. violating the implied easement of reasonable surface use in the Mineral Lease by disposing of other solid or hazardous waste mixed waste landfills created from old mined pits.

259. Counter-Defendant Kiewit entered and continue to enter property owned by the Peelers without authorization by:

a. storing and disposing on the Peeler Ranch coal ash waste resulting from lignite mined from off-tract properties at the locations identified by Kiewit ash disposal maps submitted to the RRC from 2011 to present day;

b. allowing fugitive dust from waste piles at Ramps 8 and 10 to blow onto the Peeler Ranch;

c. allowing leachate from waste piles at Ramps 8 and 10 to run onto the Peeler Ranch;

d. failing to maintain the ponds in the Area A Mine area such that wastewater seeps into the soils and groundwater on the Peeler Ranch; and

e. failing to remove ash from the Plant such that the ash builds up and gets into the drainage ways that run onto the Peeler Ranch;

260. Counter-Defendants' entry was physical, intentional, and voluntary, and caused injury to the Peelers' right of possession.

261. All 25 individual Counter-Defendants are liable for trespass based on the participation in, acquiescence in, and/or ratification of the foregoing acts and omissions of SMECI employees and agents. The 21 director Counter-Defendants (including Mike Kezar in his capacity as a SMECI board member) were regularly briefed on "plant operations," "environmental updates," and the "Peeler lease" by the senior staff members (including Brummett, Burris, Cates, Frisbee, and Kezar in his capacity as general manager) at monthly board meetings from 2015 to the present. In addition, the board approves the budget – including all expenditures related to the

acts and omissions resulting in the foregoing acts of trespass. In the course of those briefings and in their approval of SMECI's budgets, the board members explicitly or tacitly approved, before or after the fact, the tortious actions of SMECI's employees resulting in trespass to the Peeler Ranch.

262. In addition, the 21 director Counter-Defendants are also liable for trespass based on their negligent supervision of the SMECI employees and agents. Since 2015, SMECI's board of directors have been extensively briefed by senior staff members about pollution from SMECI's property that has damaged large portions of the Peeler Ranch. Yet they have not taken sufficient actions to prevent or mitigate that pollution. As discussed in Wilhelm Liebmann's July 2, 2019 affidavit, the board is passive in its approach to managing SMECI's employees and activities. Indeed, Liebmann admitted that the board does not "take on the role of management" of SMECI's employees and, instead, delegates that role to senior staff members (whom Liebmann refers to as "management"). That passive approach has violated the board members' statutory obligation to manage the cooperative and also violates SMECI's by-laws. Furthermore, the board has been negligent in failing to provide proper education and training to its senior staff members concerning the proper disposal of coal ash, wastewater, and other pollutants that have harmed the Peeler Ranch.

263. Counter-Defendants' trespasses are permanent because either (a) the damage from the coal ash, fugitive dust, contaminants, and wastewater is not capable of being repaired, fixed or restored, or (b) even if capable of repair, there is substantial certainly that the injury will be repeatedly, continually, and regularly recur, such that future injury can be reasonably evaluated.

264. In the alternative, the damage to the Peelers' property is temporary because it can be repaired, fixed, or restored, and any anticipated recurrence would be only occasional, irregular,

intermittent, and not reasonably predictable, such that future injury could not be estimated with reasonable certainty.

265. Counter-Defendants' efforts to conceal the harm caused by its activities to the Peeler Ranch was grossly negligent and done with malice and deliberately and willfully caused the Peelers' injuries.

266. Counter-Defendants further harmed the Peelers by failing to take action to ensure that the coal ash, fugitive dust, contaminants, or wastewater would not migrate, unauthorized, onto portions of the Peelers' property that had not yet been impacted. Counter-Defendants' failure to take action to prevent the contaminants from entering additional properties that had not yet been impacted was grossly negligent and done with malice and deliberately and willfully caused the Peelers' injuries.

267. Counter-Defendants' unauthorized entry onto the Peelers' property resulted in the following damages:

a. Repair damages for the cost and expense of restoring the property to its former condition prior to the trespass;

b. Damages for the loss of use of the property caused by the trespass;

c. Diminution in market value damages based on a comparison of the original value of the Peelers' property and the value after repairs are made;

d. Damages for the intrinsic value of the trees and plants that died or have been distressed due to the trespass;

e. Damages for mental anguish as a result of deliberate and willful trespass that caused actual property damage;

f. Expenses incurred on account of the trespass;

g. Exemplary damages for trespass as a result of Counter-Defendants' gross negligence or malice; and

h. Court costs.

268. In addition, to remedy Counter-Defendants' continuing unauthorized entry to the Peelers' property, the Peelers request a permanent injunction halting all present and future handling, treatment, storage, transportation and/or disposal of coal ash or any solid or hazardous waste on the Peeler Ranch and a mandatory injunction requiring cleanup and restoration of the site, as described below.

COUNT 3 – NEGLIGENCE

(PLAINTIFF/COUNTER-DEFENDANT SMECI, COUNTER-DEFENDANTS KIEWIT AND STEC, AND 25 INDIVIDUAL DEFENDANTS)

269. The preceding paragraphs are incorporated herein by reference as if fully set forth below.

270. Plaintiff/Counter-Defendant SMECI and Counter-Defendants Kiewit and STEC owed a legal duty to the Peelers to exercise reasonable care to prevent injury to the Peelers and their property.

271. Plaintiff/Counter-Defendant SMECI and Counter-Defendants Kiewit and STEC created a dangerous condition by failing to exercise reasonable care in its handling, treatment, storage, transportation and disposal of coal ash and other solid and hazardous waste and wastewater, and this condition resulted in injury to the Peeler Ranch.

272. Plaintiff/Counter-Defendant SMECI and Counter-Defendants Kiewit and STEC were aware, or should have been aware, that their improper handling, treatment, storage, transportation, and disposal of coal ash and other solid and hazardous waste and wastewater was

releasing contamination to the groundwater, surface water, and soil and damaging the Peelers' property.

273. Further, once aware that operations and disposal were causing damage to the property, Plaintiff/Counter-Defendant SMECI and Counter-Defendants Kiewit and STEC failed to take affirmative action to control or avoid increasing the danger to the Peelers' property. SMECI and STEC even took apparent retaliatory measures to release contaminated wastewater and flood hundreds of acres of the Peeler Ranch outside the mine permit boundary in response to the Peelers' concerns.

274. All 25 individual Counter-Defendants are liable for negligence based on the participation in, acquiescence in, and/or ratification of the foregoing acts and omissions of SMECI employees and agents. The 21 director Counter-Defendants (including Mike Kezar in his capacity as a SMECI board member) were regularly briefed on "plant operations," "environmental updates," and the "Peeler lease" by the senior staff members (including Brummett, Burris, Cates, Frisbee, and Kezar in his capacity as general manager) at monthly board meetings from 2015 to the present. In addition, the board approves the budget – including all expenditures related to the acts and omissions resulting in the foregoing acts of negligence. In the course of those briefings and in their approval of SMECI's budgets, the board members explicitly or tacitly approved, before or after the fact, the tortious actions of SMECI's employees resulting in harm to the Peeler Ranch.

275. In addition, the 21 director Counter-Defendants are also liable for negligence based on their negligent supervision of the SMECI employees and agents. Since 2015, SMECI's board of directors have been extensively briefed by senior staff members about pollution from SMECI's property that has damaged large portions of the Peeler Ranch. Yet they have not taken sufficient actions to prevent or mitigate that pollution. As discussed in Wilhelm Liebmann's July 2, 2019

affidavit, the board is passive in its approach to managing SMECI's employees and activities. Indeed, Liebmann admitted that the board does not "take on the role of management" of SMECI's employees and, instead, delegates that role to senior staff members (whom Liebmann refers to as "management"). That passive approach has violated the board members' statutory obligation to manage the cooperative and also violates SMECI's by-laws. Furthermore, the board has been negligent in failing to provide proper education and training to its senior staff members concerning the proper disposal of coal ash and other pollutants that have harmed the Peeler Ranch.

276. Counter-Defendants' negligence proximately caused injury to the Peelers, which resulted in the following damages:

a. Repair damages for the cost and expense of restoring the property to its former condition prior to the negligent operations and disposal;

b. Damages for the loss of use and enjoyment caused by the negligent operations and disposal;

c. Diminution in market value damages based on a comparison of the original value of the Peelers' property and the value after repairs are made;

e. Expenses incurred on account of the negligence;

f. Mental anguish damages;

f. Exemplary damages for gross negligence or malice; and

g. Court costs.

COUNT 4 – NEGLIGENCE PER SE

(PLAINTIFF/COUNTER-DEFENDANT SMECI, COUNTER-DEFENDANTS KIEWIT AND STEC, AND 25 INDIVIDUAL DEFENDANTS)

277. The preceding paragraphs are incorporated herein by reference as if fully set forth below.

278. Plaintiff/Counter-Defendant SMECI and Counter-Defendants Kiewit and STEC are violating RRC Statewide Rule 8, which provides that, "No person conducting activities subject to regulation by the [RRC] may cause or allow pollution of surface or subsurface water in the state," 16 TEX. ADMIN. CODE § 3.8(b).

279. SMECI, Kiewit, and STEC are violating the requirement to prevent water from coming into contact with acid-forming and toxic-forming spoil, in accordance with 16 TEX ADMIN CODE §§ 12.346(2) and 12.386.

280. SMECI, Kiewit, and STEC are violating the requirement to prevent, minimize, and treat water pollution, in accordance with 16 TEX. ADMIN. CODE § 12.339(d).

281. SMECI, Kiewit, and STEC are violating 30 TEX. ADMIN. CODE § 335.4, which prohibits the collection, handling, storage, processing, or disposal of industrial solid waste in such a manner so as to cause: (1) "the discharge or imminent threat of discharge of industrial solid waste . . . into or adjacent to the waters in the state;" (2) "the creation and maintenance of a nuisance; or (3) the endangerment of the public health and welfare."

282. SMECI and STEC are violating the requirement to complete reclamation efforts on all land disturbed by surface mining activities as contemporaneously as practicable with mining operations, in accordance with 16 TEX. ADMIN. CODE § 12.383.

283. SMECI and STEC are violating the requirement to restore the Peeler Ranch to prior or better uses in accordance with 16 TEX. ADMIN. CODE § 12.399(a)(1), (a)(2).

284. SMECI and STEC are violating the prohibition against dilution to meet the limits for hazardous metals discharged to inland waters of the state found at 30 TEX. ADMIN. CODE § 319.24. SMECI and STEC dilute the wastewater held in the Mine prior to testing and discharge.

285. SMECI and STEC violated the Clean Water Act, 33 U.S.C. § 1311(a)(1) by discharging wastewater on or about June 28, July 12, and August 13, 2018 from Outfall 012 M/R by Pond 7 in the Mine, across the Peeler Ranch, thereby flooding hundreds of acres of the Peeler Ranch for days at a time, in violation of the applicable permit, which specifically "does not grant the permittee the right to use private or public property for conveyance of wastewater along the discharge route described in this permit." TPDES Permit No. WQ0002043000 at p. 8.

286. The Peelers are included in the class of persons that these statutes regulations are designed to protect, and the injury to the Peelers is of the type the statute was designed to prevent.

287. SMECI, Kiewit, and STEC's violations of these statutes and regulations is without legal excuse.

288. All 25 individual Counter-Defendants are liable for negligence per se based on the participation in, acquiescence in, and/or ratification of the foregoing acts and omissions of SMECI employees and agents. The 21 director Counter-Defendants (including Mike Kezar in his capacity as a SMECI board member) were regularly briefed on "plant operations," "environmental updates," and the "Peeler lease" by the senior staff members (including Brummett, Burris, Cates, Frisbee, and Kezar in his capacity as general manager) at monthly board meetings from 2015 to the present. In addition, the board approves the budget – including all expenditures related to the acts and omissions resulting in the foregoing acts of negligence per se. In the course of those briefings and in their approval of SMECI's budgets, the board members explicitly or tacitly approved, before or after the fact, the tortious actions of SMECI's employees resulting in injury to the Peeler Ranch.

289. In addition, the 21 director Counter-Defendants are also liable for negligence per se based on their negligent supervision of the SMECI employees and agents. Since 2015, SMECI's

board of directors have been extensively briefed by senior staff members about pollution from SMECI's property that has damaged large portions of the Peeler Ranch. Yet they have not taken sufficient actions to prevent or mitigate that pollution. As discussed in Wilhelm Liebmann's July 2, 2019 affidavit, the board is passive in its approach to managing SMECI's employees and activities. Indeed, Liebmann admitted that the board does not "take on the role of management" of SMECI's employees and, instead, delegates that role to senior staff members (whom Liebmann refers to as "management"). That passive approach has violated the board members' statutory obligation to manage the cooperative and also violates SMECI's by-laws. Furthermore, the board has been negligent in failing to provide proper education and training to its senior staff members concerning the proper disposal of coal ash and other pollutants that have harmed the Peeler Ranch.

290. SMECI, STEC, and Kiewit's statutory and regulatory violations and negligence per se proximately caused injury to the Peelers, which resulted in the following damages:

a. Repair damages for the cost and expense of restoring the Peeler Ranch to its former condition prior to the violations;

b. Damages for the loss of use and enjoyment caused by the violations;

c. Diminution in market value damages based on a comparison of the original value of the Plaintiffs' property and the value after repairs are made;

d. Expenses incurred on account of the negligence per se;

e. Exemplary damages for gross negligence or malice; and

f. Court costs.

COUNT 5 – TEXAS NATURAL RESOURCES CODE SECTION 85.321

(PLAINTIFF/COUNTER-DEFENDANT SMECI, COUNTER-DEFENDANTS KIEWIT AND STEC, AND 25 INDIVIDUAL DEFENDANTS)

291. The preceding paragraphs are incorporated herein by reference as if fully set forth below.

292. A landowner harmed by a violation of Chapter 85 of the Texas Natural Resources Code or "another law of this state prohibiting waste or a valid rule or order of the [RRC] may sue for and recover damages and have any other relief to which he may be entitled at law or equity." TEX. NAT. RES. CODE § 85.321.

293. The Peelers have been harmed by SMECI, Kiewit, and STEC's violations of RRC Statewide Rule 8, which provides that, "No person conducting activities subject to regulation by the [RRC] may cause or allow pollution of surface or subsurface water in the state," 16 TEX. ADMIN. CODE § 3.8(b).

294. The Peelers have been harmed by SMECI, Kiewit, and STEC's violations of the RRC requirement to prevent water from coming into contact with acid-forming and toxic-forming spoil, in accordance with 16 TEX. ADMIN. CODE §§ 12.346(2) and 12.386.

295. The Peelers have been harmed by SMECI, Kiewit, and STEC's violations of the RRC requirement to prevent, minimize, and treat water pollution, in accordance with 16 TEX. ADMIN. CODE § 12.339(d).

296. The Peelers have been harmed by SMECI and STEC's violations of the RRC requirement to complete reclamation efforts on all land disturbed by surface mining activities as contemporaneously as practicable with mining operations, in accordance with 16 TEX. ADMIN. CODE § 12.383.

297. The Peelers have been harmed by SMECI and STEC's violations of the RRC requirement to restore the Peeler Ranch to prior or better uses in accordance with 16 TEX. ADMIN. CODE § 12.399(a)(1), (a)(2).

298. All 25 individual Counter-Defendants are liable for the violations of Chapter 85 of the Texas Natural Resources Code based on the participation in, acquiescence in, and/or ratification of the foregoing acts and omissions of SMECI employees and agents. The 21 director Counter-Defendants (including Mike Kezar in his capacity as a SMECI board member) were regularly briefed on "plant operations," "environmental updates," and the "Peeler lease" by the senior staff members (including Brummett, Burris, Cates, Frisbee, and Kezar in his capacity as general manager) at monthly board meetings from 2015 to the present. In addition, the board approves the budget – including all expenditures related to the acts and omissions resulting in the foregoing acts of trespass. In the course of those briefings and in their approval of SMECI's budgets, the board members explicitly or tacitly approved, before or after the fact, the tortious actions of SMECI's employees resulting in trespass to the Peeler Ranch.

299. In addition, the 21 director Counter-Defendants are also liable for violation of Chapter 85 of the Texas Natural Resources Code based on their negligent supervision of the SMECI employees and agents. Since 2015, SMECI's board of directors have been extensively briefed by senior staff members about pollution from SMECI's property that has damaged large portions of the Peeler Ranch. Yet they have not taken sufficient actions to prevent or mitigate that pollution. As discussed in Wilhelm Liebmann's July 2, 2019 affidavit, the board is passive in its approach to managing SMECI's employees and activities. Indeed, Liebmann admitted that the board does not "take on the role of management" of SMECI's employees and, instead, delegates that role to senior staff members (whom Liebmann refers to as "management"). That passive approach has violated the board members' statutory obligation to manage the cooperative and also violates SMECI's by-laws. Furthermore, the board has been negligent in failing to provide proper

education and training to its senior staff members concerning the proper disposal of coal ash and other pollutants that have harmed the Peeler Ranch.

300. Counter-Defendants' violations of the RRC Rules caused injury to the Peelers, which resulted in the following damages:

a. Repair damages for the cost and expense of restoring the property to its former condition prior to the violations;

b. Damages for the loss of use and enjoyment caused by the violations;

c. Diminution in market value damages based on a comparison of the original value of the Peelers' properties and the value after repairs are made;

d. Expenses incurred on account of the violations;

e. Exemplary damages for gross negligence or malice;

f. Court costs; and

g. Attorneys' fees.

301. In addition, the Peelers request a permanent injunction halting all present and future handling, transportation, treatment and/or disposal of coal ash on the Peeler property and a mandatory injunction requiring cleanup of the site, as described below.

H. Relief

302. The Peeler Ranch seeks monetary relief over $1,000,000. TEX. R. CIV. P. 47(c)(5).

IV. APPLICATION FOR MANDATORY INJUNCTIVE RELIEF

303. The Peelers also seek a mandatory injunction requiring cleanup of the contamination and restoration of the property that results, at a minimum, in: (1) full site characterization including vertical and horizontal delineation of the pollution; (2) the complete removal of coal ash and other solid or hazardous waste disposed in and on the Peeler Ranch; (3)

closure or retrofit of the surface impoundments and Ash Landfill at the Plant with composite liners with a synthetic liner; (4) no impact to surface or groundwater with contaminants above natural background levels, and (5) the land returned to conditions before installation of the Plant and Mine operation, including comparable trees and vegetation.

V. APPLICATION FOR DECLARATORY RELIEF

304. Pursuant to TEX. CIV. PRAC. & REM. CODE § 37.003, the Peelers seek a finding and determination that Counter-Defendants, and not the Peelers, are liable for all response costs or damages resulting from the release of contamination from the coal ash, wastewater, and other solid or hazardous waste handled, treated, stored, transported, and/or disposed at the San Miguel Power Plant or San Miguel Lignite Mine.

305. The Peelers also seek costs and reasonable and necessary attorneys' fees, as are equitable and just, pursuant to TEX. CIV. PRAC. & REM. CODE § 37.009.

VI. JURY DEMAND

306. The Peelers request a trial by jury in the present cause and tendered the appropriate fee with their original pleading.

VII. CONDITIONS PRECEDENT

307. All conditions precedent have been performed or have occurred.

VIII. REQUEST FOR DISCLOSURE

308. Under TEX. R. CIV. P. 194, the Peelers request that Plaintiff/Counter-Defendants SMECI and all other Counter-Defendants disclose, within 30 days of the service of this request, the information or material described in Rule 194.2.

IX. PRAYER

309. For these reasons, the Peelers ask that the Court render judgment that Plaintiff/Counter-Defendant SMECI take nothing and that the Peelers be awarded a judgment against all Counter-Defendants for the following:

a. Actual damages;

b. Mandatory injunction requiring cleanup of the contamination and restoration of the property that results, at a minimum, in: (1) full site characterization including vertical and horizontal delineation of the pollution; (2) the complete removal of coal ash and other solid or hazardous waste disposed in and on the Peeler Ranch; (3) closure or retrofit of the surface impoundments and Ash Landfill at the Plant with composite liners with a synthetic liner; (4) no impact to surface or groundwater with contaminants above natural background levels, and (5) the land returned to conditions before installation of the Plant and Mine operation, including comparable trees and vegetation.

c. Declaratory judgment in favor of the Peelers pursuant to TEX. CIV. PRAC. & REM. CODE § 37.003, finding and determining that Counter-Defendants are liable for all response costs or damages resulting from the contamination;

d. Mental anguish damages;

e. Exemplary damages;

f. Prejudgment and post-judgment interest;

j. Court costs;

h. Attorneys' fees; and

i. All other relief to which the Peelers are entitled.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 23, 2019, the following counsel of record have been served with a copy of this document through electronic service.

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